The Central Law Journal.

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THE recent convention of the American Bar Association at Chicago was, probably, the most notable gathering of representative jurists ever had in this country. The addresses of David Dudley Field, the venerable retiring president of the association; of Judge Henry B. Brown, of Michigan, on "Judicial Independence;" of Walter B. Hill, of Georgia, on the "National Judicial System," and of Simeon E. Baldwin, of the Yale law school, on the "Centenary of Modern Government," were deliverances of exceptional excellence and ability. As the *Albany Law Journal* well says, nothing could be imagined more impressive than Mr. Field, in the full possession of bodily and mental faculties of the highest order, at an age rarely reached by men in any calling who have been so active as he, as he closed his able address, itself largely an argument for codification and law reform, in these words "My closing utterances from this place to members of this association, and to all the members of my profession as well—a profession to which I have devoted a long life and which I greatly honor—shall be in these words: You must, of course, be true to your clients and the courts, but you must also give speedy justice to your fellow-citizens, more speedy than you have yet given and you must give them a chance to know their laws."

THE address of Mr. Hill was, in part, devoted to the subject of relief of the United States Supreme Court docket, and suggested a resolution pledging the association to the plan of an intermediate appellate court. This aroused considerable discussion. Ex-Senator Trumbull suggested, as a solution of the problem, that the United States courts be restricted to the jurisdiction they possessed during the first fifty years of their history, arguing that the present trouble was occasioned largely by the extensive jurisdiction conferred upon them by reason of contentions, growing out of the late civil war. Mr. Parker, of New Jersey, with commendable candor at least, mentioned as one cause for the press of business in the federal courts, that the State judges had not that independence of thought and action, that enabled them to give complete satisfaction in the rendition of decisions. Mr. Wilson, of Minnesota, very aptly contended, that a corporation should not be permitted to remove to the United States courts, cases which involve no federal question merely because the corporation resides, by fiction of law, in another State. It does not seem to have occurred to any one to advise, that under the restrictions imposed by the act of 1887, the dockets of the United States courts are much lighter than formerly, and that before the committee of the association, who have for some years been considering the matter, have reached a conclusion, the trouble will probably remedy itself.

A COMMITTEE of the association reported in favor of a law, regulating the form and obligations upon commercial paper, bills of exchange, and bills of lading used in interstate commerce. It would seem as though such a law might be justified, in view of the chaotic condition existing under the divergent laws of the various States. And the proposition, in favor of a simple, concise, national bankrupt act, its administration to be within a court of equity rather than a bankrupt court, may be the best solution of that question. Little consideration seems to have been given the question adverted to in one of our recent issues, pertaining to reform or change in legislative methods, and nothing appears to have been done except to adopt the report of the committee. In view of its great importance—second to none brought to the attention of the association—it was to be hoped, that a full and thorough discussion would be brought out, and a better plan than that suggested by the committee might be evolved. Some reflection, on the subject, has convinced us of the inefficiency of the plan, as proposed, viz: the appointment of a joint committee of revision by the two houses of the legislature, counseled by the attorney general. This, in effect, is the present procedure and practice and there is nothing new in it except perhaps the feature of the attorney general. In

order to avoid the evil of hasty, ill-considered, and defective legislation, the duty at least of considering, advising and counseling the legistature should be placed upon men outside its ranks, who have the time to consider, the ability to discern and the strength to advise in the direction of clear, consistent, and constitutional legislation.

THE recent decision, of the English court of appeals, in the case of the Mogul Steamship Co. v. McGregor, involving the important question as to the legality of a trade combination, will be read with especial interest in this country.

It appeared in this case, that the appellees and other shipping companies formed themselves into a conference, or association, and allowed a rebate of five per cent. on all freights paid by shippers who shipped tea from Hankow for Europe in vessels of the association only. After admitting the appellant company to the combination for one season, the appellees issued to the China tea merchants a circular declaring the appellant company excluded from the conference, and giving notice that any merchant shipping in the appellant's vessels would lose the rebate. The appellant brought suit against the appellees, alleging that this combination amounted to an unlawful conspiracy. Lord Chief-Justice Coleridge held, in the trial court, that the combination among the appellees to secure the China trade to themselves was not illegal, but came within the bounds of legitimate trade competition. A majority of the court of appeals have just sustained the opinion of the Lord Chief-Justice. Lord Justice Fry said that the combination of the appellees was simply in order to promote their own gain, and that there was nothing illegal in that, provided they did not circulate false rumors or resort to intimidation or fraud in order to destroy the competition of the appellant.

It is probable that the interesting question involved in this case will be brought up to the House of Lords. Whether it will be sustained there remains to be seen. If it should be upheld, the decision will settle for England the principle that combinations, as such, without the elements of intimidation or fraud for the purpose of combination, are lawful. On page 254 of this issue will be found an interesting comment upon the subject from the *London Law Journal*.

NOTES OF RECENT DECISIONS.

THE question whether a judgment is a contract is one, which will not stay decided, at least in the opinion of some old common law practitioners. It was again presented to the Supreme Court of the United States in the case of Freeland v. Williams. The plaintiff sued, in a State court of chancery of West Virginia, to set aside a judgment which he alleged was void, because recovered against him for acts of war during the rebellion, and for its invalidity he relied upon the legislation of West Virginia, under the constitution of 1872, which was adopted after the recovery of this judgment in question. The purport of this legislation was to entitle the defendant in any such judgment to have it set aside. The question presented to the Supreme Court of the United States now, was whether such legislation, impairing the effect of the judgment, impaired the obligation of a contract within the familiar constitutional provision. The part of the opinion that is important to practitioners generally is that which bears upon this general question. The court, after quoting from the previous cases of Louisiana v. Mayor of New Orleans (109 U. S. 285), and Garrison v. City of New York (21 Wall. 196), reiterated the rule that a judgment for tort while it may be declared upon as a specialty or a contract of record, cannot convert a transaction wanting the assent of parties into one which necessarily implies it, at least for the purpose of this constitutional provision. The result of this decision and those which it follows, is somewhat curious. A judgment is not a contract in substance for any of those purposes in which the existence of assent is necessary, but it is so completely classed with contracts for the purpose of remedies, that a statute giving remedies in actions upon contract is properly to be construed, in the absence of any indication of different intent, as including judgments.

UNDER what circumstances a mortgage executed by an insolvent upon a stock of

goods will be held a general assignment for the benefit of creditors is well illustrated in Richmond v. Mississippi Mills, decided by the Supreme Court of Arkansas. There an insolvent executed a mortgage of his entire stock of goods to T and several other creditors, all of whose claims were past due, and by the mortgage authorized the mortgagees to take immediate possession of the goods, sell them at private sale, and apply the proceeds in payment of their claims. It was agreed that T should represent the other mortgagees, and the mortgagor and T agreed upon a third person to act as manager in the disposition of the goods. He also issued a circular to all his unsecured creditors, informing them of the mortgage, and saying: "I regret the necessity, but it protects all from complications." He also sent to each of such creditors an order on T for the amount of his claim, directing T to pay it out of the proceeds of the goods, after satisfying the mortgagees, if the surplus should be sufficient; if not, to pay it *pro rata*. *Held* a general assignment for the benefit of creditors. The court says:

The statute of Arkansas respecting assignments undertakes to regulate the execution of the trust. Except that the deed must contain nothing directing a different execution, the statute has nothing to do with the contents of the deed. Preferences are allowed as at common law. Neither preferences long since given nor those recently made by mortgage or otherwise are invalidated by the subsequent execution of a deed of assignment. A preference may be by mortgage, by confession of judgment, by pledge, by deed of trust in the nature of a mortgage, or by stipulation in the deed of assignment. Much confusion in analyzing the authorities arises from a failure to discriminate between the conditions which exist here and in some States where insolvent laws have been passed, and the conditions in such States vary *inter se*. Thus in Missouri, since the statutes of 1864, it is held that a deed in trust to secure the debts of two creditors is an assignment which will inure to the benefit of all the creditors of the debtor (Martin v. Hausman, 14 Fed. Rep. 160; Crow v. Beadsley, 68 Mo. 435); while in Illinois and Wisconsin, under statutes varying slightly, it is held that the right to prefer a creditor still exists, and may be exercised in any way except by assignment. White v. Cotzhausen, 129 U. S. 329, 9 Sup. Ct. Rep. 309; Winner v. Hoyt, 66 Wis. 227, 28 N. W. Rep. 380. In Massachusetts, instruments similiar in many respects to those under consideration in this case are not within the prohibition of the statutes of assignments. Henshaw v. Summer, 23 Pick. 446. It results that the decisions of many other courts are persuasive, with us only in so far as they discuss the principles which determine the character of the instruments under consideration. The necessity in other States of considering statutory provisions to determine the nature of the instrument makes the entire decision worthless here. A deed of assignment contemplates the intervention and agency of a trustee, though none need be named in the deed. Burrill, Assignm. § 3; Burrows v. Lehndorff, 8 Iowa, 96. Hence conveyances directly to creditors, in payment or by way of security for their own debts solely, are not, generally, assignments for the benefit of creditors. Bouchaud v. Dias, 1 N. Y. 201, 204; U. S. v. McLellan, 3 Sum. 345. Nowhere is the essential character of an assignment (trust-deed), as contrasted with that of a mortgage, better stated than by Mr. Justice Walker in Turner v. Watkins, 31 Ark. 437. He says: "The conclusion reached is that where the grantor parts with his title, giving it to the trustee absolutely, for the purpose of raising a fund to pay debts, this is, properly speaking, a deed of trust; but where the conveyance is to secure a debt, in case of default, thus assimilating the transaction to a mortgage, and where the intent of the grantor, instead of parting with his estate, is to retain it, in case he performs his obligations according to its terms, instruments of this class are also, but less technically called deeds of trust, but in substance they are mortgages." See, also, Hoffman v. Mackall, 5 Ohio St. 124. An assignment, then, as Burrill says, it is a transfer by a debtor, without compulsion of law, of some or all of his property to an assignee or assignees, in trust to apply the same, or the proceeds thereof, to the payment of some or all of his debts, and to return the surplus, if any, to the debtor. A mortgage is a security against the default of a debtor in the payment of his debts. The true meaning and effect of an instrument determine its character; and ordinarily, but not necessarily, these are gathered from the language of the instrument.

We say that the meaning of the instrument is ordinarily gathered from the language in which it is couched, because that is usually the best evidence of the intention of the parties to it. But parol evidence of facts collateral to those stated in the instrument is admitted to show their full intention. It was formerly held that the grounds upon which parol evidence was admissible to show that a deed absolute on its face was a mortgage, were fraud, accident, or mistake. Freeman v. Baldwin, 13 Ala. 246; Whitfield v. Cates, 6 Jones Eq. 136. But the doctrine of our own court, as first stated in Johnson v. Clark, 5 Ark. 321, puts it upon the broad ground that the bill of sale, though absolute in form, was intended as a mortgage. Jones, Mortg. §§ 285-323; Jones, Chat. Mortg. § 23. The true character of an instrument, then, is not necessarily discernible on its face. A deed absolute in form may be conditional and defeasible in fact, while an instrument with formal defeasance may be intended to be, and may operate as, an unqualified conveyance. In Kohn v. Clement, 58 Iowa, 593, 12 N. W. Rep. 550, it is held that a mortgage or mortgages in form may be intended to be and actually constitute an absolute deed of trust. In White v. Cotzhausen, 129 U. S. 329, 9 Sup. Ct. Rep. 309, it is held that two mortgages and a confessed judgment constitute an assignment, by reason of the intention of the parties and the operation of the instruments. In Winner v. Hoyt, 66 Wis. 227, 28 N. W. Rep. 380, six mortgages to six different creditors were executed on the same day, with an agreement that Hoyt, one of the mortgagees, should take the property and manage it for all the mortgagees, selling it off at once for cash, applying the proceeds to the debts. The intention of the parties, as gathered from the whole transaction, was held to determine its character; and, as it was contemplated that the conveyances should operate to carry the property absolutely to the mortgagees, to raise a fund to pay debts, it constituted an assignment, with Hoyt

as trustee. These and a multitude of other decisions emphasize the statement often made that the law will not be blinded by forms or names, but will look beyond, to the substance of the transaction under consideration, and fix its character according to the intention of the parties. Jones, Chat. Mortg. § 24; Horne v. Puckett, 22 Tex, 201; Hopkins v. Thompson, 2 Port. (Ala.) 433. We do not hold that the giving of one or more mortgages, the confession of judgments, or other means adopted to give security or preference, constitute necessarily, or even ordinarily, an assignment. But we hold that where one or more instruments are executed by a debtor, in whatsoever form or by whatsoever name, with the intention of having them operate as an assignment, and with the intention of granting the property conveyed absolutely to the trustee to raise a fund to pay debts, the transaction constitutes an assignment.

A QUESTION as to the power of a public telephone company to refuse the use of its facilities to a telegraph company, came before the Supreme Court of Vermont in Commercial Union Telephone Co. v. New England Telegraph Co. There it was held that a public telephone company, having furnished telephone facilities to one telegraph company with the consent of its licensor, cannot refuse to furnish like facilities to all other telegraph companies, notwithstanding it is forbidden to do so by its contract with the owner and licensor of the patent. Such portion of the contract is void. The court says:

The principle contended for by the relator has frequently been applied to railroads and other carriers of persons and freight. It was held in Bennett v. Dutton, 10 N. H. 481, that the proprietors of a stage coach, who hold themselves out as common carriers of passengers, are bound to receive all who require a passage, so long as they have room, and there is no legal excuse for a refusal; and it is not a lawful excuse that they run their coach in connection with another coach, which extends the line to a certain place, and have agreed with the proprietor of such other coach not to receive passengers who come from that place on certain days, unless they come in his coach. In the case of Express Co. v. Railroad Co., 57 Me. 188, the defendant let to the Eastern Express Company, for four years, the exclusive use of a certain separate apartment in a car attached to each of its passenger trains for the purpose of transporting the express company's messenger and merchandise, and agreed that it would not, during the continuance of such contract, let any space in any car on its passenger trains to any other express carrier; and the defendant, before the expiration of such contract, but after reasonabl enotice, refused to receive upon any terms from the New England Express Company such packages as are usually carried by express companies to be transported by its passenger trains. It was held that "common carriers are bound to carry indifferently, within the usual range of their business, for a reasonable compensation, all freight offered, and all passengers who may apply. For similar equal services they are entitled to the same compensation. All applying have an equal right to be transported or to have their freight transported in the order of their application. * * * The very definition of a common carrier excludes the idea of the right to grant monopolies, or to give special and unequal preferences. It implies indifference as to whom they may serve, and an equal readiness to serve all who may apply. * * * They cannot, having the means of transporting all, select from those who may apply some whom they will, and reject others whom they can but will not carry. They cannot rightfully confer a monopoly upon individuals or corporations." See, also, Sandford v. Railroad Co., 24 Pa. St. 378. In the case of Express Co. v. Railroad Co., 8 Fed. Rep. 799. McCrary, J., said that it was the duty of defendant as a public servant to receive and carry goods for all alike without injurious discrimination as to rates or terms; that railroad companies must carry express packages and the messenger in charge of them, for all express companies that apply, on the same terms, unless excused by the fact that so many apply it is impossible to accommodate all. The same was held in Samuels v. Railroad Co., 31 Fed. Rep. 57, where defendant discriminated against one of two rival lines of steam-boats by charging it fifty cents a hundred more for freight than the other. Also, where a railroad company has established commutation rates for a particular locality, and sold commutation tickets thereat to the public, the refusal of such a ticket to a particular individual, under the same circumstances and upon the same conditions as such tickets are sold to the rest of the public, is an unjust discrimination against him, and a violation of the principles of equality which the company is bound to observe in the conduct of its business. State v. Railroad Co., 2 Atl. Rep. 803. In McCoy v. Railroad Co., 13 Fed. Rep. 3, it was held that a railroad company was bound to trahsport over its road and deliver to all stock yards, at a certain point reached by its line, all live stock consigned which shippers desired to consign to them, upon equal terms and in like manner, and it cannot bind itself to perform this duty for one to the exclusion of another and competing yard; and in Hays v. Pennsylvania Co., 12 Fed. Rep. 309, it was held that a railroad, though owned by a corporation, is, in a qualified sense, a public highway, constructed for public uses, and everybody constituting part of the public for whose benefit it was authorized is entitled to an equal and impartial participation in the use of the facilities it is capable of affording. A discrimination in the rates of freight between the same points is unreasonable and unjust. The same rule has been applied to gaslight companies. Where a citizen has made all necessary preparations to receive and use gas in his store or residence upon the line of a company's pipes, upon his compliance with the reasonable terms and rules of the company the latter is bound to furnish him gas. Shepard v. Gas-Light Co., 6 Wis. 539; People v. Gas-Light Co., 45 Barb. 137. A case more directly in point is that of Friedman v. Telegraph Co., 32 Hun, 4, where a suit was brought to restrain the removal of two instruments in plaintiff's place of business. It was held that the defendant, being a public corporation, could make no distinction in respect to persons who wish to partake of the privileges which it was created to furnish, and owes the duty impartially to grant to all who comply with its rules the privileges furnished. See, also, Smith v. Telegraph Co., 42 Hun, 454, which was a suit brought to restrain the removal of "a ticker" or reporting instrument, maintained and operated by the defendant, and from doing or failing to do any act which would in any way interfere with the receipt by the plaintiff of the quotations of the New York Stock Exchange. The court, in commenting upon the obligations of corporations to the public, said: "These

obligations do not rest on contract, but on the ground that when one is engaged in a business, public in its nature, he must, if public policy requires, serve the public impartially." The case of State v. Telephone Co., 22 Alb. Law J. 363, was an application for *mandamus* to compel the defendant to connect the plaintiff's office with its wires, and give it the use of telephonic facilities. The defendant contended that it could not be compelled to do so, because by the terms of its license from the patentee of the invention it was forbidden to connect with any telegraph office or permit any telegraph company to become one of its subscribers. Thayer, J., said: "In my judgment, this clause of the contract is indefensible when called in question by any person or corporation injuriously affected thereby. In so far as the contract between the respondent and the patentee compels the former to discriminate against one class of its would be customers, and to deny them the same privileges and service which it accords to others, the contract is invalid. It is not possible to admit the principle that a railroad, telegraph, or telephone company may avoid the performance of any part of the paramount duty they owe to the entire public by contract obligations which they may enter into, even with the patentee of an invention." In Transfer Co. v. Telephone Co., 24 Alb. Law J. 283, the plaintiff was a proprietor of public omnibuses and carriages, and the defendant was a telephone company, and also proprietor of public carriages. Upon an application by plaintiff for an injunction to restrain the defendant from removing its telephone from the plaintiff's office, and from refusing to transact its (plaintiff's) telephone business pursuant to contract, the defendant insisted that a mere rival in one branch of its business could not force it to afford it facilities which it had provided for another branch of its business. The court said "that the real contention between the plaintiff and defendant is confined to their carriage and *coupe* services; defendant insisting that, as against plaintiff, a rival in that business, it has the right to a monopoly in the use of its own telephonic methods of communicating, and receiving orders for *coupes;* that a mere rival in one branch of its business cannot force it to afford it the facilities which it has provided for another branch of its business; * * * that defendant is engaged in two distinct employments — one in operating a telephonic exchange, and the other in operating a carriage or *coupe* service. Plaintiff and defendant are not rivals in the former business, and as to that part of defendant's business it occupies the same position towards plaintiff as it does towards the rest of the public; that defendant is a *quasi* public servant, and as such is bound to serve the general public, including plaintiff, on reasonable terms, with impartiality; that defendant is governed by the principles of the law of common carriers." In Telephone Co. v. Telegraph Co., 66 Md. 359, 7 Atl. Rep. 809, the court, holding the same view, said: "The telegraph and telephone are important instruments of commerce, and their service as such has become indispensable to the commercial and business public. They are public vehicles of intelligence, and they who own or control them can no more refuse to perform impartially the functions that they have assumed to discharge than a railway company, as a common carrier, can rightfully refuse to perform its duty to the public. * * * They have no power to discriminate, and, while offering readily to serve some, refuse to serve others." A recent case, and one relied upon by the relator's counsel, is that of State v. Telephone Co., 28 Fed. Rep. 539 (Cir. Ct. E. D. Mo.), which arose upon a state of facts nearly identical with those in the case at bar. Brewer, J., in giving the opinion of the court, from which Treat, J., dissented, said: "Now, the question is whether the court can compel this defendant, doing the telephonic business of this city, to establish communication with any other individual or company than that permitted by its license from the patentee. I believe fully in the sacredness of property, but I think all property stands upon an equal basis, whether that property consists of gold dollars in your pocket, real estate, or the ownership of a patent. There is no peculiar sanctity hovering over or attaching to the ownership of a patent. It is simply a property right, to be protected as such. Starting from that as a basis, while every property owner may determine for himself to what he will devote his property, yet the moment he puts that property into what I perhaps may, for lack of a better expression, define as the 'channels of commerce,' that moment he subjects that property to the laws which control commercial transactions. * * * A telephonic system is simply a system for the transmission of intelligence and news. It is, perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all. It may not say to the lawyers of St Louis: 'My license is to establish a telephonic system open to the doctors and the merchants, but shutting out you, gentlemen of the bar.' The moment it establishes a telephonic system here, it is bound to deal equally with all citizens in every department of business; and the moment it opened its telephonic system to one telegraph company that moment it puts itself in a position where it was bound to open its system to any other telegraph company tendering equal pay for equal service. So my conclusion is that, notwithstanding the terms of this license, which seemed to inhibit it from dealing or giving its telephonic privileges to any other telegraph company than the Western Union, the moment it established its telephonic system here—that moment it compelled itself to respond to the demands of any telegraph company or any individual in the city tendering to it equal pay for equal privileges. The application for *mandamus* will be sustained." The Supreme Court of Nebraska has rendered a similar decision in State v. Telephone Co., reported in 22 N. W. Rep. 237. The same question was before the Supreme Court of Pennsylvania in Telephone Co. v. Com., 3 Atl. Rep. 825, which contains a full review of the decided cases, and in which the same doctrine is held. See, also, People v. Telephone Co., 19 Abb. N. C. 466 (decided in 1887). The rule of law recognized in the foregoing cases does not in any wise conflict with section 4884 of the Revised Statutes of the United States, which in substance provides that every patent shall contain a grant to the patentee, his heirs or assigns, of the exclusive right to make, use, and vend the invention or discovery throughout the United States; nor with the decision of the United States Supreme Court in Gayler v. Wilder, 10 How. 478, that the monopoly of making, using, and vending an invention or discovery created by this statute is all there is of a patent; that it is the power to exclude others from using the products of his labor without his consent which constitutes the whole property of a patentee. It is true that the owner may divide his right, conveying to one the right to make, to another the right to use, and to another the right to vend; that he may limit the time and the territory within which the subject of his patent may be used. Adams v. Burke, 17 Wall. 453; Mitchell v. Hawley, 16 Wall. 544; Nicke v. Kleinknecter, 7 O. G. 1098; Telegraph Co. v. Brooklyn, 14 Fed. Rep. 225.

As to who are fellow-servants in the law of negligence the Supreme Court of Minnesota in Lindvall v. Woods, says:

In the law of master and servant there are two familiar rules: First, that the master is not responsible to the servant for the negligence of another servant in the same common employment, unless the master was negligent in the employment of such fellow-servant; second, that the master is bound to use due care in furnishing safe structures or instrumentalities with which the servant is to work, and he is responsible if, through his own negligence, or the negligence of other servants employed to furnish them, they are unsafe, and injury follows. We think the facts of this case bring it within the first of these rules. The work which the defendants were engaged in was grading a railroad, and they employed various servants in different departments of labor on that work, but all liable to be called, upon the orders of the foreman, from one department to another. All those engaged in these different departments bore to each other the relation of fellow-servants. They were all serving the same master, under the same control, and all engaged in the same general work. The thing to be done was the building of the road, and the co-operation of all the employees in each department of the work was necessary to bring about that result. The trestle was not a structure furnished by the defendants for their employees to work on, but was itself a part of the work which they were employed to perform. It was a thing which they themselves made, and was as much a part of the construction of the road as was digging in the pit, loading cars, driving teams, or tamping dirt on the dump. Kelley v. Norcross, 121 Mass. 508; Colton v. Richards, 123 Mass. 484; Kellea v. Faxon, 125 Mass. 485; Peschel v. Railway Co., 62 Wis. 338, 21 N. W. Rep. 269; Gallagher v. Piper, 16 C. B. (N. S.) 669. Johnson was a fellow-servant with plaintiff. It is claimed, however, that Murdock, the foreman, was a vice-principal, and therefore, for any negligence on his part, the defendants were liable. The authorities upon the question when and under what circumstances the servant becomes representative of the master are involved in much confusion and conflict, but any one desirous of examining them will find them exhaustively cited and classified in 7 Am. & Eng. Cyclop. Law, under the head of "Fellow-Servants." But, under the doctrines announced in various decisions of this court, we think it must be held that in the work of constructing this road Murdock was a fellow-servant of the plaintiff. In Brown v. Railroad Co., 27 Minn. 162, 6 N. W. Rep. 484, it was held that difference in grade of employment, or in authority with respect to each other, does not remove employees from the class of fellow-servants, as regards the liability of the master for injuries to one caused by the negligence of the other. And, in speaking in that case of the basis upon which this rests, it is said: "If the servant is supposed to assume the risks which the master, with due care and diligence cannot prevent, * * * then he assumes the risks from negligence of those servants who may be placed over him as superior servants or overseers, as well as of those of equal grade with himself; for in respect to such overseers or superior servants the master, when he has used due care in selecting them, cannot prevent their casual negligence any more than he can prevent the casual negligence of those inferior in grade." On the same ground it was held in Gonsior v. Railroad Co., 36 Minn. 385, 31 N. W. Rep. 515, that "a truck packer" and the foreman of a round-house were fellow-servants, although the former was subject to the orders of the latter. In Olson v. Railway Co., 38 Minn. 117, 35 N. W. Rep. 866, it was held that a section foreman and the section men were fellow-servants; and in Brown v. Railway Co., 31 Minn. 553, 18 N. W. Rep. 834, it was said that one employee becomes a vice-principal, as respects another, only when he is intrusted with the performance of some absolute and personal duty of the master himself, such as the providing of proper instrumentalities with which the service of an employee is to be performed, or the general management and control of the master's business or some branch of it. In the cases of Fraker v. Railway Co., 32 Minn. 54, 19 N. W. Rep. 349, and Tierney v. Railway Co., 33 Minn. 311, 23 N. W. Rep. 229, the question whether the negligent employees were vice-principals or fellow-servants was made to depend, not upon their grade or rank, but upon the nature of the service which they performed; in the former case the defendant being held not liable because it was a servant's, and not a master's, duty which the employee was discharging, and in the latter the defendant being held liable because the employee was discharging a master's, and not a servant's, duty. The result of these decisions would seem to be that it is not the rank of the employee or his authority over other employees, but the nature of the duty or service which he performs, that is decisive; that, whenever a master delegates to another the performance of a duty to his servant which rests upon himself as an absolute duty, he is liable for the manner in which that duty is performed by the middleman whom he has selected as his agent, and to the extent of a discharge of those duties by the middleman, however high or low his rank, or however great or small his authority over other employees, he stands in the place of the master, but as to all other matters he is a mere co-servant. It follows that the same person may occupy a dual capacity of vice-principal as to some matters, and of fellow-servant as to others. Hence, in the present case, if the defendants delegated to Murdock, the foreman, the duty of employing laborers for this work, or providing materials for the building of the trestle, and he had been guilty of negligence in employing incompetent men, or in furnishing improper material, the defendants would be liable, for these are duties which the master owes personally and absolutely to his servants. But in whatever he did on the work which was the object of their common employment, viz., the building of this road, he was a mere fellow-servant with the laborers subject to his orders; and for his negligence in such matters the defendants would not be liable, unless they were negligent in employing him, of which there is no claim.

The duty of a street railway to keep its road-bed in repair was well considered by the Supreme Court of Tennessee in Memphis, P. & B. Ry. Co. v. State. It was held that a street railway company is bound to keep its entire road-bed, to the ends of its ties, and its crossings, in repair, so as not to obstruct travel across its road, or longitudinally upon it, and this duty is a continuing one, whether the charter so expressly requires or not, and that a street railway company, failing to so repair, and thereby obstructing travel, is

indictable for maintaining a nuisance. The court says:

The doctrine contended for is that a railroad company, after constructing its road, and having restored those portions of the public highway disturbed to their former state of usefulness, is under no duty to make any repairs. The case of Railroad Co. v. State, 16 Lea, 300, is relied on as a conclusive adjudication of this question in favor of defendants; but that case has been expressly overruled at this term, in an opinion by Judge Caldwell in the case of Railroad Co. v. Dyer Co., 11 S. W. Rep. 943. In Railroad Co. v. State, 3 Head, 524, the following principles, as applicable to the occupancy of public highways by railroads, are stated: "Railway companies are liable to indictment for obstructing a public highway contrary to the powers granted in their act." "The company must so use their own rights as not to injure or take away the rights of others." Pierce, R. R. 245, says: "The laying of a railroad across highways often requires excavations and erections, and a greater or less change in the surface. The duty, however, to restore the highway, as far as may be, to its former conditions, and to erect and maintain structures necessary for such restoration is presumed to be incumbent on the company, even without any express requirement imposed by statute. * * * It is a continuing duty, and binds other corporations which succeed to the ownership or possession of the railroad." To the same effect is Mills, Em. Dom. § 198. In a note to Cooke v. Railroad Co., on page 332, 10 Am. & Eng. R. Cas., giving a summary of the decisions on this subject, the following is stated: "As to the question whether the company is bound to maintain the crossing permanently or not, the current of authority seems to be that it is so bound. People v. Railroad Co., 67 Ill. 118; Eyler v. Commissioners, 49 Md. 257." And this, though by a statute the obligation is in express terms only not to obstruct the safe use of the highway. Where a statute provided that "a railroad shall be so constructed as not to obstruct the safe and convenient use of the highway," the obligation of the company was held not to be limited to the original construction. "It must keep the railroad so constructed at all times. Its obligation so to do is continuing." Wellcome v. Leeds, 51 Me. 313. The only case called to our attention holding the contrary doctrine is that of Railroad Co. v. Long, 6 Am. & Eng. R. Cas. 254. In Burritt v. City of New Haven, 42 Conn. 174, it is declared that the charters of corporations which confer exclusive privileges for the particular advantage of the grantees are to be construed liberally for the benefit of the public, and strictly as against the corporations, and that the duty of a railroad company, under its charter, to restore a highway to its former usefulness was not discharged when it restored it to a proper condition at the time the railroad was constructed, but the duty was a continuing one. The duty to maintain the usefulness of streets, under charters which did not in express terms impose the obligation to repair, was enforced in two Minnesota cases—one reported in 36 N. W. Rep. 870 (State v. Railway Co.), and the other in 39 N. W. Rep. 154, (*Id.*) In Wood, Ry. Law, it is stated that "the right to lay a railway track in a public street or highway carries with it the obligation not only to lay it in a proper manner, but also to keep it in repair;" and "if the statute simply provides that the company 'shall restore the highway to its former state of usefulness,' etc., they are invested with a discretion as to the matter, and are not subject to the control of the municipal authorities in this respect, and are liable for the consequences of a failure to discharge this duty and are also charged with the further duty of keeping that part of the highway in a proper condition. In other words, the obligation imposed upon them in this respect is a continuing one, and they must so restore the highway that its use by the public shall not be materially interfered with, and so that it shall not be rendered less safe or convenient, except in so far as diminished safety and convenience are inseparable from its use by the railroad; and the question whether or not the company has discharged its duty is a question of fact for the jury." See volume 2, § 269, p. 970, note 1, and page 976. In the case of Railroad Co. v. Dyer Co., 11 S. W. Rep. 943, it was held that where a railroad company makes a cut through a public highway, and builds a bridge over its road, the law imposes upon it the continuing duty of repairing the bridge, although its charter did not expressly so require, but simply by its express terms imposed the duty of restoring the highway to its former state of usefulness. These rules, laid down in respect to steam-railway companies, apply, not only to crossings, but to the entire road-bed of street railway companies; for their occupation of the street is held not to be a new burden upon the street, or a diversion of its use as a highway, for the reason that such occupation is assumed to be entirely compatible with the use by the public. This is based upon the idea that a street railway, properly constructed and maintained, is not an obstruction, though it may be an inconvenience. When it is so constructed or maintained as to become an obstruction, it ceases to preserve the character upon which its grant of rights in public highways is predicated. The charter of this company shows that it was intended that the space occupied by it should be used by the public as a highway, the right of way being given to defendant's cars. It is its common law duty to keep the space of the highway occupied by its road-bed (which extends at least to the ends of its cross ties) properly graded and in good repair, so as not to be any obstruction to travel across the road-bed, or longitudinally upon it, and also to keep the crossings where its road-bed is traversed by streets in good repair.

WHETHER shaving a man for hire is a work of necessity within the statute prohibiting labor on Sunday the Supreme Court of Indiana, in Ungericht v. State, say is a question for the jury under proper instructions. The court says:

Many legal definitions of the word "necessity" are to be found in the authorities, but the following from the Chicago Legal News (volume 12, p. 44), seems to give the result of all the authorities upon the subject: "The law contemplates that the community has a general need that all should rest on Sunday. Most of the affairs and doings of week days are less important than this need of a rest day, but some few are superior. To keep the body physically sustained by food; to provide the facilities for worship doing some hours of the day, and for restful mental occupation during others; to nurse and heal the sick; to provide prompt burial for the dead; these and some other objects are superior to the need of general repose. Necessary work includes all that is indispensable to be done on Sunday in order to secure the attainment of whatever is more important to the community than its day of

rest." It is perfectly clear, however, that the word "necessity," as used in this statute, is incapable of an accurate and comprehensive definition. Any attempt by the courts to frame a definition of general application would be more likely to produce confusion than certainty. The question in each case must be decided according to the circumstances, and is, therefore, more a question of fact than of law. Mueller v. State, 76 Ind. 310. In this case it is said: "What does 'necessity,' as used in this law, mean? It may be said, as has been said before, that it does not mean an absolute or physical necessity, but a moral fitness or propriety of the work or labor done, under the circumstances of any particular case. Generally speaking, it ought to be an unforeseen necessity, or, if foreseen, such as could not reasonably have been provided against." Morris v. State, 31 Ind. 189. It was held more than fifty years ago that the matter of shaving customers was not a work of necessity, and therefore a violation of the law prohibiting the desecration of the Sabbath. Phillips v. Innes, 4 Clark & Fin. 234: Bish. St. Crimes, § 245. In the case of State v. Frederick, 45 Ark. 347, the court say: "The indictment need not to allege that it was not a work of necessity or charity. The courts will take judicial notice that the shaving of his customers by a barber is a worldly labor, or work done by him in the course of his ordinary calling, and not within the exceptions of the statute." In the cases of Com. v. Jacobus, and Com. v. Williams, 15 Cent. Law J. 145, it was held that a barber who shaves persons on Sunday in a public shop is guilty of Sabbath-breaking. In the case of Com. v. Jacobus, *supra*, the court say: "But is it a work of necessity? Many persons shave themselves on that day who are shaved by a barber on other days of the week, and not one in ten who shave on that day employ the services of a barber." In this case Jacobus shut up his "tonsorial parlor" at 10 o'clock on Sunday morning; but the court thought that made no difference, and added: "If the closing of these shops on Sundays is an inconvenience to the public, the remedy rests with the legislature, and not with the court." But it is held by this court that it must be left to the jury, as a question of facts, to determine, under proper instructions from the court, what particular labor under the circumstances would constitute a work of necessity. Edgerton v. State, 67 Ind. 588.

The case of Tomby v. State, upon the question of forgery, decided by the Supreme Court of Alabama, will give considerable comfort to bad writers. If the defendant therein had been under the disadvantage of writing a good legible hand he would undoubtedly have found himself in the State prison. It was there held that an indictment which merely sets out a writing on which the forgery charged is predicated, wanting in the legal requisites to its validity, or so imperfect or incomplete that it cannot be the foundation of a legal liability, and its real meaning and terms are not intelligible from the words and characters used, does not charge an offense.

PRIORITY IN THE RECORD OF DEEDS.

Where the Statute Determines Priority by the Record.—The registry statutes of about one-third of our States and territories declare, in substance, that an unrecorded conveyance shall be void as against a subsequent purchaser of the property, for valuable consideration and in good faith, or without notice, "whose conveyance shall be first duly recorded."[1] Where priority of record is thus expressly required, no question properly arises that the subsequent conveyance will not, under any circumstances, be entitled to precedence unless it is the first registered.[2]

A considerable majority of the statutes, however, do not contain any requirement that the subsequent conveyance, in addition to being taken in good faith, shall also be first recorded.[3] Under these latter statutes, when a subsequent deed is taken for value, and without any notice of a prior conveyance of the property by the same grantor, a question as to the effect of priority of record as between the two conveyances is presented. After the second deed has been executed and delivered, will a first record of the earlier deed then establish its precedence? or is the matter of priority of record as between the two of any consequence whatever?

How the General Law of Priority is Declared.—Our latest and ablest text-writers, without, however, having under discussion the precise question as here presented, have all declared that where the matter is not otherwise controlled by actual notice, priority of record determines priority of right.[4] It is stated as the general rule that mortgages take precedence according to the order of their record:[5] and that the courts have generally regarded the first recorded of two deeds as the one entitled to preference.[6] From the stand point of equity jurisprudence it is said that the right created by a prior unrecorded

[1] California, Dakota, Idaho, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New York, Oregon, Pennsylvania, Tennessee, Utah and Wisconsin.

[2] The courts of these States have sometimes had occasion to declare the statutory rule. Fallas v. Pierce, 30 Wis. 443; Galway v. Malchow, 7 Neb. 285; Burns v. Berry, 42 Mich. 176; Grant v. Bisset, 1 Caines Cas. (N. Y.) 112; Den v. Richman, 1 Green, 13 N. J. L. 43 (former statute); Willard v. Ramsburg, 22 Md. 206.

[3] Missouri, Texas, Alabama, Ohio, etc.

[4] 1 Devlin on Deeds, § 626.

[5] 1 Jones on Mort. § 558.

[6] Wade on Notice, § 256.

instrument is generally regarded as tantamount to an equitable interest "which may therefore be cut off by a subsequent purchaser who is in all respects *bona fide, and who has also obtained the first record.*"[7] Even when considered entirely as general propositions, these expressions are justly subject to some criticism; and to whatever extent they may be true in a general sense, or the principles stated be applicable elsewhere, they do not apply to the case here presented. By an overwhelming weight of authority the courts have decided that in the case stated above priority of record is of no consequence, and will not determine priority of right in favor of the earlier deed.

Equity Protects a Bona Fide Purchaser.—It was doubtless the intent of the law in providing the earlier registry acts, to determine the priority of conveyances by the artificial and arbitrary matter of record, and exclusively by the order of their registry.[8] But this purpose was soon broken in upon by the courts of equity in striking down this record priority in every case where the subsequent conveyance first recorded was taken with actual notice of the older one. They declared in effect that the equity of the case should control the letter of the law.[9] The rule so declared as to registry has been accepted by courts and legislatures alike, and is now embodied in the terms of a large majority of the recording acts.[10] Some of the statutes, however, while enacting the rule that protects the unregistered conveyance against any but a *bona fide* purchaser, have rather inconsistently superadded the arbitrary requirement that such subsequent purchaser must obtain the first record. This condition is not in harmony with the equitable rule of which it is thus made a part. As far as the proviso extends, it proposes to determine priority exclusively by the artificial matter of record, just as the original act proposed to determine it in all instances. Both parties in this case stated are *bona fide* purchasers, it is true, but where one has been negligent, an artificial criterion should not determine the issue in his favor.

The Legal View of the Question.—Where the statutes have not enacted priority of record, the courts, aside from any equitable considerations, have in most instances decided the question as a purely legal one in favor of the subsequent purchaser, though his conveyance is not first recorded. A register act of Ohio declared an unrecorded deed "fraudulent as against any subsequent *bona fide* purchaser for valuable consideration, without notice"—language not substantially different from the general terms of the statutes that do not require priority of record. Construing this statute, the Supreme Court of the United States say that *by virtue of its terms* it avoids the unrecorded prior deed, as against the subsequent purchaser, whether his title be recorded or not.[11] The New Jersey court emphasize this view further by saying that as the statute declares the prior deed void as against the subsequent one, it must remain in that condition; and that a contrary interpretation would interpolate in the statute the words "unless it is recorded before the subsequent deed is recorded."[12] The statute prescribes but a single condition to give the second deed priority, viz., *bona fides;* and it is not competent for the court to require priority of record as a second condition.[13] To the same effect is the language of the Alabama court in holding that where the act makes no requirement of the second mortgagee that he shall first record his mortgage, such record is not necessary as against the prior conveyance, though it would be against a subsequent third conveyance. The statute, it is said, pronounces the second mortgage, in its execution and delivery, the superior of the first. A different rule would prevail if the statute gave preference to the mortgage first recorded.[14] This is the case in New York under the present statute requiring priority of record; but the rule as in Alabama obtained under the former statutes,[15] and is supported by quite a number of decisions in other States.[16] There is nothing, said

[7] 2 Pom. Eq. Jur. § 758.

[8] Act of 7th Anne, ch. 20.

[9] Le Neve v. Le Neve, Amb. 436, 1 Ves. 64; 3 Atk. 646; Davis v. Strathmore, 16 Ves. 419.

[10] The courts usually hold the rule to prevail, though it be not declared in the statute. Phifer v. Barnhart, 88 N. C. 333; Frostburg v. Hamill, 55 Md. 313; Holt v. Russell, 56 N. H. 559; Campbell v. Roach, 45 Conn. 667.

[11] Steele v. Spence, 1 Pet. 552.

[12] Sanborn v. Adair, 29 N. J Eq. 338.

[13] De Courcey v. Collins, 21 N. J. Eq. 357.

[14] Coster's Executors v. Bank of Ga., 24 Ala. 37.

[15] Hawley v. Bennett, 5 Paige, 104; Jackson v. Center, 19 Johns. 281.

[16] See Byrd v. Wilcox, 8 Baxt. 65, 68; Coleman v. Barklew, 3 Dutch. 357; Northrup v. Bremer, 8 Ohio,

Mr. Justice Walker, of the Texas court, in the terms of the law, nor in any decisions upon it, which countenances the view that the unregistered deed, declared by the statute void as to such subsequent purchaser, can be validated as against him by securing its earlier registration.[17]

Under Statutes Differently Worded.—This legal and statutory view of the matter could not, of course, furnish the basis of decision where the wording of the statute is materially different. In several States the statutes neither require the subsequent conveyance to be first recorded, nor do they in terms declare the unregistered first conveyance void as against a subsequent purchaser in good faith. In Connecticut and Vermont, for instance, the statutes provide only that until recorded, the conveyance shall not be effectual to pass title except as against the grantor and his heirs;[18] while in North Carolina the act merely prescribes that conveyances shall be recorded within two years.[19] It may be remarked that wherever, under the terms of the statute, actual notice is held of no effect whatever, the question here presented does not arise, since, in such case, priority of record is of necessity the only criterion by which, under the operation of the registry acts, priority of right is to be determined. In Louisiana the doctrine of actual notice is now rejected entirely;[20] and in Arkansas, North Carolina and Ohio, it is denied as to mortgages, under statutes separate from these relating to the registry of deeds.[21] While in all these States, except Louisiana, actual notice of an unrecorded deed is effectual,[22] yet still where recording is made or held essential to the title passing, it may be well contended that the subsequent deed must be first recorded in order to give it effect.

How the Matter stands in Equity.—In equity and reason the right of the subsequent purchaser must be regarded as superior, though his deed be not first recorded.[23] At common law there was no obligation to put on record a conveyance of lands,[24] and no equity could arise in favor of a subsequent purchaser because this had not been done; but since the statutes have provided the system and imposed the duty of registry, a subsequent party who finds of record no conveyance of the property from the one appearing to be the owner, and who has no actual notice of such conveyance, has a right to presume that none such has been made. Under these circumstances his equity becomes fixed when he parts with a valuable consideration on the faith of the unincumbered record;[25] and since actual and direct notice to him cannot then affect his rights,[26] it must be held in equity, the statute not arbitrarily directing the matter, that the mere constructive notice afforded by registry is even less effectual for that purpose. In the case stated, registry can serve no purpose as notice to either one of the parties, both of whom have already purchased. The object of the record is to notify subsequent parties, those who have not already bought, and thus to close the door before the steed is stolen—not afterwards. As the tardy record of the earlier deed can serve no purpose as notice to the subsequent party after the time of his purchase, it cannot, as against his rights, atone for the negligence of the first grantee in not having it made before that time.

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392; Wheaton v. Dyer, 15 Conn. 307; Chaffee v. Halpin, 62 Miss. 1; Gardner v. Earley (Iowa), 34 N. W. Rep. 311.]

[17] Ranney v. Hogan, 1 Tex. Un. Cas. 253.

[18] Gen. Stats. Conn. (1888), § 2961; Rev. Laws Vt. (1880), § 1931.

[19] Code of Ga. (1882), § 2705.

[20] Harang v. Plattsmeir, 21 La. Ann. 426; Derbes v. Romero, 32 *Id.* 927; Payne v. Pavey, 29 *Id.* 116. Since the adoption of the constitution of 1869, it is rejected as to mortgages as well as deeds. Adams v. Daunis, 29 *Id.* 315.

[21] Dodd v. Parker, 40 Ark. 526; Berdaw v. Cockerill, 20 Ohio St. 163; Bank v. Manufacturing Co., 96 N. C. 298.

[22] See cases cited in note 10.

[23] Where, in a matter of this kind, the statute does not furnish the rule, the court will decide it on the very equity of the case. Johnson v. Newman, 43 Tex. 628; Swigert v. Bank of Ky., 17 B. Mon. 268.

[24] Aubuchan v. Bender, 44 Mo. 564; Clark v. White, 12 Pet. 178.

[25] Wheaton v. Dyer, 15 Conn. 307; Boggs v. Varner, 6 Watts & S. 469, 474.

[26] Stanhope v. Varney, 2 Eden, 81; Youst v. Martin, 13 Serg. & R. 167; Etsey v. Lutzen, 8 Hare, 159.

DEATH BY WRONGFUL ACT — SUIT BY PARENT—MEASURE OF DAMAGES.

AGRICULTURAL & MECHANICAL ASSOCIATION, ETC. V. STATE TO USE, ETC.

Court of Appeals of Maryland, June 11, 1889.

In an action by a parent, under the Maryland statute, which authorizes suits for the benefit "of the wife, husband, parent and child," to recover damages

for alleged negligence of defendant resulting in the death of plaintiff's minor son, no probable pecuniary profits to plaintiff from the continuance of the minor's life beyond majority can be considered in estimating damages, notwithstanding it appeared that such minor had been emancipated by plaintiff two years previous to his death, and had, in the mean time, voluntarily turned over his earnings to the parent, and also promised to assist the parent after he became of age.

MILLER, J., delivered the opinion of the court:

This suit was brought under the negligence law, by a father to recover damages for the death of his minor son, caused, as it is alleged, by the negligence of the defendant. Many actions have been brought under this statute, and they seem to be daily increasing in number. The legal principles which govern them are familiar, but there is always more or less difficulty in the application of these principles to particular cases. Here the boy killed was 19 years and seven months old, and he met his death under peculiar circumstances. We gather from the record that in October, 1888, the defendant held a fair on its grounds at Hagerstown. Among the exhibitions offered for the amusement of visitors were balloon ascensions and trapeze performances in the air. The preparations for these were in a circular inclosure in a part of the fair grounds, and several large poles were planted by which the balloons could be stayed and held while they were in process of inflation and made ready to be set up. One of those poles, which it is alleged was insecurely fixed in the ground, fell upon the boy, and killed him. He had a ticket as keeper of stock which admitted him to the fair-grounds free of charge, but with all the privileges of an ordinary visitor. There was the usual conflict of testimony as to negligence on the part of the defendant, and as to contributory negligence on the part of the deceased, but on this part of the case little need be said. We find no error warranting a reversal in the instructions on these subjects given to the jury by the learned judge before whom the case was tried, in granting the plaintiff's third and fifth prayers, and the defendant's third, fourth, eighth, ninth, and tenth prayers. The defendant's fifth, sixth, and seventh prayers on the same subject were properly rejected, because those granted fully covered the law, as to this branch of the case. The multiplication of prayers substantially the same on subjects about which the law has been thoroughly well settled is a practice much to be deprecated.

But the question most earnestly argued arises upon the rulings as to the measure of damages. The judge was clearly right in instructing the jury that in estimating the damages they were confined to the pecuniary damages sustained by the plaintiff. The authorities all agree that in suits under Lord Campbell's act, and similar statutes in this country, pecuniary damages only can be recovered. Nothing can be given the father as a *solatium* for the bereavement suffered by the loss of his child. The statute does not deal with the priceless value at which a father holds the life of his child, and only professes to compensate him for the pecuniary loss he may sustain by his death. But the court told the jury, that, in estimating such damages, they could allow the father what they may believe, from all the evidence in the case, will be an adequate compensation "for the loss of his son's life," and refused to instruct them that they could only give such as they may believe from the evidence will be an adequate compensation for the loss of his son's services "until he should arrive at the age of twenty-one years." So the question is fairly raised whether, in a suit by a father under this statute to recover damages for the death of a minor child, the jury should be allowed to take into account any expectation of pecuniary benefit to the plaintiff from the continuance of the child's life beyond minority.

There is conflict of authority on this subject in other States. Railroad Co. v. Zebe, 33 Pa. St. 330; Caldwell v. Brown, 53 Pa. St. 453; Birkett v. Ice Co., 110 N. Y. 504, 18 N. E. Rep. 108. But, so far as this State is concerned, we think the question has been settled. It first arose in the case of Coughlan v. Railroad Co., 24 Md. 84, which was decided in 1865, and is among the first, if not the first, case in which this statute was construed, it having been passed in 1852. In that case the boy killed was between 10 and 12 years of age. He had no father living, and the suit was brought by his widowed mother, who had a large family, and kept a small grocery store. He was her eldest child, a smart, likely lad, who attended the store when his mother was absent, and his services were worth to her from five to six dollars per month at the time the accident occurred. The court below (Martin, J.) instructed the jury on the question of damages, that they could only give the mother such sums as they "may believe from all the evidence in the case will be an adequate compensation for the loss of her son's services from the time of his death to the period when, if he had lived, he would have attained the age of twenty-one years." This instruction was vigorously assailed by able counsel in argument, but this court affirmed it, and said: "To submit to a jury the value of a life without limit as to years would have been to leave them to speculate upon its duration without any basis of calculation. The law entitles the mother to the services of her child during minority only. Beyond this, the chances of survivorship, his ability or willingness to support her, are matters of conjecture, too vague to enter into an estimate of damages merely compensatory. According to the appellant's theory, the mother and son are supposed to live on together to an indefinite age; the one craving sympathy and support, the other rendering reverence, obedience, and protection. Such pictures of filial piety are inestimable moral examples, beautiful to contemplate, but the law has no standard by

which to measure their loss. It has been suggested that by alluding to the fact that the mother was entitled by law to the services of her child during minority only, the court intended to say that all actions under this statute must be founded on legal liability alone. But we do not so understand the court's judgment. What the court was enforcing and deciding was that jurors ought not to be allowed in such cases to assess damages upon vague conjecture or speculation." The danger of verdicts founded on mere guess-work is alluded to in a previous part of the opinion, where it is said that "generally speaking, the influence of the court in this class of cases should be exerted to restrain those excesses into which juries are apt to run." The legal right of the mother to the services of her minor son is referred to as furnishing a safe basis from which the jury may reasonably infer that she suffered a pecuniary loss by his death, and as affording her a reasonable expectation of pecuniary benefit from the continuance of his life during minority. But what a minor child may be able or willing to do for his father or mother after he becomes of age, when he has the right to leave the parental roof and set up for himself in life, and before his willingness and ability have been tested by experience, is, as we understand the court to say, a matter of conjecture, too vague to enter into an estimate of damages in such a case.

Such is the meaning and effect of this decision. It is a leading one in our State, and has been repeatedly followed. In Railroad Co. v. Moran, 44 Md. 283, the boy killed was old enough to be a fireman on a locomotive engine, and an instruction containing the same restriction met the approval of this court. In Railroad Co. v. Stansbury, 54 Md. 648, the boy was 12 years old, and a like instruction was granted. So in Albert v. Ryan, 66 Md. 325, 7 Atl. Rep. 697, where a minor son sued for the death of his father, his right to prospective damages was limited to his attaining his majority. In fact, Coughlan's Case has in this State been universally recognized as having settled the law on this subject. Nor has it been overruled or shaken by anything said or decided in Railroad Co. v. Hauer, 60 Md. 449. On the contrary, it is there cited with approval, and carefully distinguished from the case then under consideration. Our statute, unlike those of some of the States which give the action for the benefit of the next of kin generally, closely follows Lord Campbell's act, and allows suits only for the benefit "of the wife, husband, parent, and child" of the person killed. And in Hauer's Case the court, following the English decisions construing their statute, decided that legal liability alone is not the test of the injury in respect of which damages may be recovered under the statute, but that the reasonable expectation of pecuniary advantage by the relative remaining alive may be taken into account by the jury, and damages given in respect of that expectation if it be disappointed, and the probable pecuniary loss thereby sustained. In that case a father was killed who had two adult unmarried daughters who lived with him as part of his family, were dependent upon him for support by reason of their inability to support themselves, and the father had supported and was supporting them at the time of his death. In view of these facts the court considered it a case falling within the rule of interpretation above stated, and allowed the jury to award damages to these adult as well as to the minor children. Following in the same line is the case of Railroad Co. v. Mahone, 63 Md. 135. The person killed was a mother, who had made her permanent home with a married daughter, to whom she rendered services by attending to house-work and looking after the children while the daughter was away at work, and thus gave considerable assistance, which she had rendered and was rendering when she was killed. The court allowed the jury to consider the pecuniary value of these services to the daughter, and to award her damages for the loss of them. In each of the English decisions cited in both these cases the adult son who was killed had given and was giving assistance of a definite pecuniary amount to his parents, and this fact was relied on by the court as the evidence which showed that the father had a reasonable expectation of pecuniary benefit from the continuance of his son's life. Dalton v. Railway Co., 93 E. C. L. 296; Franklin v. Railway Co., 3 Hurl. & N. 211. Of like character to the same effect is Railroad Co. v. Adams, 65 Pa. St. 499, and many other similar cases might be cited. In these cases the son after attaining age had manifested his willingness to assist his parents by actually doing so, and when that fact is proved we can understand how the latter may reasonably expect further assistance if the son lives. But whether a minor son will do so after he comes of age is, as it seems to us, a matter of vague conjecture, which can furnish no reasonable foundation for a verdict.

In the present case the father testified that he had emancipated his son two years before he was killed; that he was working for himself, and had voluntarily given each year to witness since his emancipation $75 or $80 of his wages; that he was a farm hand, and earned from $110 to $120 a year, and was living with witness, except when at labor. But the only effect of this "emancipation," as it is called, was to protect, so long as it continued, the employer in paying his wages to the minor himself. The father could revoke the privilege at any time he chose, and collect and receive his entire wages. Again, in answer to the direct question, "Did you have any reasonable expectation that he would do this [that is, give you $75 or $80 a year] after he became of age?" the father testified that "the deceased had said that after he got of age he would help fix up the property, and that he never said anything about getting married;" and the court, against the objection of the defendant, allowed this testimony to go to the jury. But a vague declaration of

promise like this, made by a minor, has no probative force whatever, and, in our opinion, this evidence is altogether too slight and insufficient to enable a jury to find from it a ground for the reasonable expectation which the law requires. Nor do we find any evidence in this record which can have the effect of taking this case out of the rule laid down by our predecessors in Coughlan's Case. That case was, in our judgment, well decided, and we are unwilling to open wider the door for wild and excessive verdicts under this statute.

We have considered the case very carefully, and it follows from what we have said that while there is no error justifying a reversal in the other rulings of the court, there is error in the modification made by the court to the defendant's eleventh prayer, in rejecting its twelfth prayer, in granting the plaintiff's first and fourth prayers, and in the ruling relating to the admisibility of evidence contained in the second exception, and for these errors the judgment must be reversed, and a new trial awarded.

NOTE.—In the absence of statute, damages cannot be recovered by a parent for negligence causing the death of his minor child.[1] But under the English statute, Lord Campbell's act, and the statutes of most of the States, which are substantially the same as the English statute, such action may be maintained.[2] The action survives for the benefit of the next of kin, as to the wife, husband, parent or child, and ordinary only pecuniary loss can be estimated as damages. Where it is shown that the next of kin, for whose benefit the action is prosecuted, was so related to the deceased as to be entitled to his services or to support from him, as the father of a minor child, the law presumes some loss.[3] And where it appears that the deceased was a man engaged in active employment, presumably remunerative, and that he was nine months less than twenty-one years of age, a recovery may be had, in behalf of the father, of more than mere nominal damages.[4] Where it appears that the death was caused by the negligence of defendant, the next of kin may recover nominal damages without showing pecuniary loss.[5] But an intelligent jury, from common experience, may determine approximately in any given case what amount would compensate a parent for all pecuniary losses sustained by reason of the death of a minor child, and the parent should not be restricted to the recovery of merely nominal damages because of failure to prove the value of the services of the child, or the amount of expenses incurred in its behalf.[6] The fact that the parent has released to such minor his time and services during his minority may properly be considered by the jury in determining the amount of recovery; but it will not prevent the parent from recovering any pecuniary damages, such as the loss of support, that he may be able to prove resulting from his death.[7]

The proper measure of damages is the probable value of the services of the deceased from the time of his death until his majority, less the expense of maintenance during the same time.[8] But some authorities hold that the jury may take into consideration the reasonable expectation of pecuniary benefits from the continuance of life even beyond majority.[9] However, as suggested in the principal case, there is a conflict on this latter point.[10] As the damages are estimated on the ground alone that the parent has suffered a pecuniary injury by being deprived of the child's services, no damages are recoverable for injured feelings, anxiety, mental suffering, etc.[11] But medical attendances, nursing, care, etc., are proper elements of damages.[12] Under the Missouri statute,[13] damages can be recovered by a parent for the killing of a *minor* child only, and the measure of damages, in the absence of circumstances calling for punitive damages, is the pecuniary benefit the parent could hope to derive from the child during its minority; hence, held that a verdict awarding plaintiff $5,000 (the statutory amount for wrongfully causing death) damages for negligence in causing the death of a son eighteen years old in the employ of defendant as brakeman, no circumstances of aggravation existing, was excessive.[14]

Where the circumstances of the case afford a safe standard by which the compensation in damages can be measured, such standard should be given to the jury, by stating the reasonable limits within which their calculations should be confined, but where no reliable standard can be laid down it must be left to the judgment of the jury, and their finding will not be disturbed, unless it is such to show that the verdict was the result of prejudice or passion.[15]

[1] Sullivan v. Union Pac. R. Co., 2 Fed. Rep. 447; Sherman v. Johnson, 58 Vt. 40, 2 Atl. Rep. 707; Carey v. Berkshire, etc. R. Co., 1 Cush. (Mass.) 475; Green v. Hudson River R. Co., 41 N. Y. 294; Ins. Co. v. Brame, 95 U. S. 754, and cases; Cooley on Torts, 262. See note to O'Reilly v. R. Co., 29 Cent. L. J. 210.

[2] Mayhew v. Burnes, 103 Ind. 328, 2 N. E. Rep. 799; Ft. Wayne, etc. R. Co. v. Byerle, 110 Ind. 100; Pennsylvania Co. v. Lilly, 73 Ind. 252. See Games v. Worman, 69 Ind. 454; Bramwell v. Lees, 29 L. T. (O. S.) 82, 111, 166; Franklin v. Southeastern R. Co., 3 H. & N. 211; Condon v. Great Southern R. Co., 16 Ir. Ch. L. R. 415. See note to Burke v. Cork, 10 Cent. L. J. pp. 51-55.

[3] Robel v. Chicago, etc. R. Co., 35 Minn. 84, 27 N. W. Rep. 305; Chicago v. Scholten, 75 Ill. 468; Chicago v. Hesing, 83 Ill. 204; Scheffler v. Minn., etc. R. Co., 32 Minn. 518, 21 N. W. Rep. 711.

[4] Robel v. Chicago, etc. R. Co., 35 Minn. 84; 27 N. W. Rep. 305.

[5] Atchison, etc. R. Co. v. Weber, 33 Kan. 543; 6 Pac. Rep. 877.

[6] Parsons v. Mo. Pac. R. Co., 94 Mo. 286, 6 S. W. Rep. 464.

[7] Kansas Code, § 422; St. Joseph, etc. R. Co. v. Wheler, 35 Kan. 185, 10 Pac. Rep. 461.

[8] Mayhew v. Burnes, 103 Ind. 328, 2 N. E. Rep. 799; Stafford v. Rubens (Ill.), 3 N. E. Rep. 568; Pennsylvania Co. v. Lilly, 73 Ind. 252; Chicago v. Scholten, 75 Ill. 468; Rockford, etc. R. Co. v. Delaney, 82 Ind. 198. See Morris v. Chicago, etc. R. Co., 26 Fed. Rep. 22; Ford v. Monroe, 20 Wend. (N. Y.) 210.

[9] Johnson v. Chicago, etc. R. Co., 64 Wis. 425, 25 N. W. Rep. 223.

[10] Caldwell v. Brown, 53 Pa. St. 453; Railroad Co. v. Zebe, 33 Pa. St. 330; Birkett v. Ice Co., 110 N. Y. 504, 18 N. E. Rep. 106; Ohio, etc. R. Co. v. Tindall, 13 Ind. 366; 3 Comstock (N. Y.) 489; 1 Cush. (Mass.) 479; Parsons v. Mo. Pac. R. Co., 94 Mo. 286, 6 S. W. Rep. 464.

[11] Steel v. Kurtz, 38 Ohio St. 191. See article on "Injury to Parental Feelings," 14 Cent. L. J. 222.

[12] Covington Street Ry. Co. v. Packer, 9 Bush (Ky.), 455; Eden v. Lexington, etc. R. Co., 14 B. Mon. 165; County Commissioners v. Hamilton (Md. Ct. App.). 18 Cent. L. J. 68; Oakland Ry. Co. v. Fielding, 48 Pa. St. 320.

[13] Rev. Stat. Mo. 1879, §§ 2121-2123.

[14] Parsons v. Mo. Pac. Ry. Co., 94 Mo. 286, 6 S. W. Rep. 464.

[15] Parsons v. Mo. Pac. R. Co., *supra*.

INJURIOUS COMBINATIONS AND FREEDOM OF TRADE.

Few cases in recent times have occurred more likely to give rise to divergence of opinion among lawyers than the case of The Mogul Steamship Company v. M'Gregor, Gow & Co., 57 Law J. Rep. Q. B. 541, in which the court of appeal gave a divided opinion on Saturday in last week. This division is due to the fact that the question involved is one largely of act and inference from fact, and the regret expressed, in commenting on the decision of Lord Coleridge (October 6, 1888), that the action was not tried by a jury, is felt the more on perusal of the judgments of the court of appeal. The ability and occasional brilliance of all the judgments must be confessed, but when so much of law as there is in the case is extracted by eliminating all but the essential point of divergence, nothing remains but the question whether the events which happened on the Yang-tze-Kiang in 1885 were or were not fair competition between English shipowners fighting for freights in the far east. Such a question is better decided by the common morality of twelve jurymen of business capacity than by the refinements, however interesting and ingenious, of learned judges. What these events were may be stated briefly in the words used in commenting on the first hearing. The plaintiffs were owners of steamships trading between Australia and London, taking Shanghai during the tea season on their way, and the defendants several firms of shipowners with lines of ships between Shanghai and London. Under the innocent name of a conference all concerned, including the plaintiffs, agreed to offer favorable terms to homeward shippers who undertake to ship no tea except on board the vessels belonging to those who joined the conference. All went well for a year, but in 1885 the defendants, through differences which had arisen with the plaintiffs, issued notices excluding the plaintiffs' ships from the conference. There was no doubt that this act damaged the plaintiffs' trade, and they brought their action to recover compensation as for an unlawful conspiracy to prevent the plaintiffs carrying on their trade. All that need be added to this statement of the facts as they appeared to the court of appeal is that more prominence was given in that court to the view that the defendants had been guilty of something like "nursing" the ships going up the river to Hangkow for cargo.

This question stands now decided in favor of the defendants on the authority of the lord chief justice, supported by Lords Justices Bowen and Fry, but with the opinion of the master of the rolls against it. The weight of Lord Esher's opinion is increased by the importance of his authority in commercial cases. His judgment elaborates, from a review of the law on the subject applicable to the case, nine propositions, from which it is enough for the present purpose to extract two. The first of these is, that "an act of competition, otherwise unobjectionable, done not for the purpose of competition, but with intent to injure a rival trader in his trade, is not an act done in the ordinary course of trade, and, therefore, is actionable if injury ensues." This proposition is echoed and amplified by Lord Justice Bowen, when he says, "Intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade is actionable if done without just cause or excuse. Such an intentional action, when done without just cause or excuse, is what the law calls a malicious wrong." The lord justice explains the phrase "without just cause or excuse" as follows:—

"The acts of the defendants which are complained of here were intentional and also calculated, no doubt, to do the plaintiffs damage in their trade. But in order to see whether they were wrongful we have still to discuss the question whether they were done without any just cause or excuse. Such just cause or excuse the defendants on their side assert to be found in their own positive right (subject to certain limitations) to carry on their own trade freely in the mode and manner that best suits them, and which they think best calculated to secure their own advantage. What, then, are the limitations which the law imposes on a trader in the conduct of his business as between himself and other traders? There seems to be no burden or restrictions in law upon a trader which arise merely from the fact that he is a trader, and which are not equally laid on all other subjects of the crown. His right to trade freely is a right which the law recognizes and encourages, but it is one which places him at no special disadvantage as compared with others."

The other of the two crucial propositions of Lord Esher was, however, not fully accepted by the lords justices. It was as follows:—

"An agreement among two or more traders, who are not and do not intend to be partners, but where each is to carry on his trade according to his own will, except as regards the agreed act, that agreed act being one to be done for the purpose of interfering — *i. e.*, with intent to interfere with the trade of another—is a thing done not in the due course of trade, and is therefore an act wrongful against that other trader, and is also wrongful against the right of the public to have free competition among traders, and is therefore a wrongful act against such trader, and if it is carried out and injury ensues, is actionable."

In considering the application of the law of conspiracy, Lord Esher says:—

"The cases cited do not determine whether an agreement which is void as between the parties to it because it is in restraint of trade is or is not an indictable offense. But if such an agreement is illegal because it is a wrong to the public, it seems to me impossible to say that it is not indictable. An illegal act which is a wrong against the public welfare seems to have the necessary elements of a crime. If, however, all agreements in restraint of trade are not necessarily indictable offenses, yet some may be. And if the agreement is one intended to interfere with the free course of trade of a trader who is not a party to the agreement, and can, if carried out, have that effect, then if such an interference is an illegal act as against that trader, it seems clear that the act of agreement is a wrongful act, both as against an individual and as against the public welfare, and then I am of opinion it must be an indictable conspiracy."

On the same subject Lord Justice Bowen says:—

"Of the general proposition that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which, if it proceeded only from a single person, would be otherwise, and the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own just rights. In the application of this undoubted principle it is necessary to be very careful not to press the doctrine of illegal conspiracy beyond that which is necessary for the protection of individuals or of the public."

XUM

He asks, have the defendants combined to do an unlawful act? Have they combined to do a lawful act by unlawful means? This brings him back to the proposition which he considers applies equally to cases in which there is and is not combination — namely, that the unlawful act must have been the intentional doing of some act to the detriment of the plaintiffs' business without just cause or excuse.

The main difference between the master of the rolls and the lords justices is that, in the opinion of the former, an agreement between traders for the purpose of interfering with the trade of another is not, to use the phrase of the master of the rolls, "in the due course of trade," but in the opinion of the latter, to use the phrase of Lord Justice Bowen, has "a just cause or excuse" in their "positive right, subject to certain limitations, to carry on their own trade freely in the mode and manner that best suits them." It will be for the House of lords to say which is right on the facts and inferences to be made in the case. Meanwhile it may be pointed out that the subject already is not altogether devoid of authority in that house, although it was not disclosed either in the argument or in the judgments. In the year 1798, in the Scotch case of Smith v. Scott, 4 Paton, 17, it was held by the house that a combination between the chase hirers of Edinburgh to charge a shilling a mile instead of nine pence, the usual charge, for a pair of horses was an illegal combination. Lord Loughborough, in giving his opinion, said:—

"In 1795 a combination was entered into by the appellants to fix a certain rate for posting, and for that purpose they published an advertisement in the Edinburgh newspapers that they were to charge a shilling a mile for a pair of horses. By this your lordships know they were imposing a law to demand from the public a certain fixed rate for posting which was illegal and unwarrantable. I submit as my opinion that this combination ought to be reprobated, and that the justices have not punished the parties by fine as they ought to have done. Indeed, if I am not misinformed, the appellants have reaped advantage from their proceedings. The court of session said to them, 'take 1s. 2d. per mile for your postchaises on account of the high price of hay, oats, and other matters used in your business as an *interim* regulation.' But, happily for the country, the price of these articles was soon lowered, and they still continued to charge the price of 1s. 2d. per mile. By these means posting was dearer in this county than in any other county in Scotland."

The proceedings in question had been taken by the Procurator Fiscal of Edinburgh before the justices in the first instance, carried by him to the court of session, against the decision of which court the chaise hirers appealed. In giving judgment Lord Loughborough drew no distinction between English and Scotch law or between this particular trade combination and others. There was no question of any other chaise hirer being injured by the combination, but the house of lords of that day were not of opinion that the combination had the just cause and excuse of free trade or the right to carry on freely their own trade in the manner that suited them best. It is true that Lord Justice Fry finds in modern legislation a stream of authority in favor of combinations, but it remains to be seen whether underneath there is not a common law set hard against combinations and not yet streamed away.—*Law Journal.*

RECENT PUBLICATIONS.

A TREATISE ON THE LAW OF MORTGAGES OF REAL PROPERTY. By Leonard A. Jones, Author also of Treatise on "Railroad Securities," "Chattel Mortgages," "Liens," Etc., Etc. In Two Volumes. Fourth Edition. Boston: Houghton, Mifflin & Company. New York: 11 East Seventeenth St. The Riverside Press. Cambridge. 1889.

The author of this work has earned an enviable reputation as an accurate and able writer. He has in his treatises on Mortgages, Chattel Mortgages, and Liens thrown much light and interest upon subjects naturally complex and uninviting. The appearance, within a period of eleven years, of four editions of this work is the best evidence of its intrinsic merit. This edition cites four thousand additional cases and is larger by about one hundred pages. Otherwise the present edition differs from the preceeding in the omission of the sections relating to the implied lien of a vendor. Mr. Jones having written a special treatise on Liens, he has removed the discussion of implied liens to the other work, retaining, however, in this new edition of Mortgages, the discussion of the vendor's lien by contract, this being considered as, in effect, an equitable mortgage. This work treats in detail of the nature of a mortgage, form and requisites of a mortgage, the parties to a mortgage, what may be the subject of a mortgage, equitable mortgages, vendor's lien, of parol evidence to prove an absolute deed a mortgage, the debt secured, insurance, fixtures, registration, notice, of void and usurious mortgages, of the respective rights of mortgagor and mortgagee, of assignments of the mortgage, merger and subrogation and of payment and discharge. The notes are thorough and the citations exhaustive, the printing first-class, and the index, that dangerous rock upon which authors are often wrecked, is beyond criticism.

BOOKS RECEIVED.

NOTES ON THE REVISED STATUTES of the United States and the subsequent legislation of Congress. By John M. Gould and Geo. F. Tucker. Little Brown & Co. Boston, Mass.

QUERIES AND ANSWERS.

[*Subscribers are invited to send short answers to the following.*]

QUERY NO. 13.

Is it professional for a lawyer to aid and assist the State's prosecuting attorney without fee or reward in any particular class of offenses? Is it professional for any attorney to aid or assist the State's attorney in the prosecution of any offense without fee or reward? Is it professional for an attorney to volunteer his services to prosecute any one charged with crime? J. L. A.

HUMORS OF THE LAW.

"MAY it please your honor, I desire to apply for a a writ of *supersedeas*," said a lank, cadaverous-looking member of the bar.

"A very appropriate thing for him to ask for," remarked a bystander, "for he certainly is the very picture of a *super-seedy-ass*."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ACCIDENT INSURANCE—It cannot be said that a passenger on a railroad train, who goes out onto the platform while the train is in motion, because he is overcome by the heat of the car, or suffering from nausea, voluntarily exposes himself to unnecessary danger, within the meaning of a policy of accident insurance. — *Marx v. Travelers' Ins. Co.* (U. S. C. C.) Colo., 39 Fed. Rep. 321.

2. ADMINISTRATORS—Accounting.—Though an administrator is not authorized to carry on his intestate's business, and should blend the expenses and disbursements connected therewith with the legitimate items of his accounts, where he charges himself with the gross profits of the business, and the court debits him with the amount thereof, he should be allowed money paid out in the course of the business.— *In re Rose's Estate* Cal., 22 Pac. Rep. 96.

3. ADMIRALTY—General Average.— Voluntary stranding, made necessary by negligence on the part of the ship, does not entitle the ship-owners to a general average contribution from the cargo saved. — *Snow v. Perkins*, (U. S. D. C.) N. Y., 39 Fed. Rep. 334.

4. ADMIRALTY — Rehearing. — A rehearing of a cause will not be granted after an assessment of damages, upon alleged new evidence that is equally controverted, and involves the reconsideration of all the previous evidence. The remedy is by appeal. — *The Hattiah*, (U. S. D. C.) N. Y., 39 Fed. Rep. 333.

5. ARBITRATION AND AWARD.— Under a submission to arbitrators of all questions in difference between the parties concerning the business of brick-making, in which they had been engaged as partners, so that all rights of action arising therefrom may be conclusively settled, the arbitrators have power to determine what amount of the uncollected assets are due to each party. —*Simons v. Mills*, Cal., 22 Pac. Rep. 25.

6. ATTACHMENT—Presumptions.—Where the return of an order of attachment shows that the officer attached certain real estate, and that when he attached the same he in fact took possession thereof, and left a true copy of the order of attachment, but does not state in so many words that he left a copy of the order with the occupant, or, if there were no occupant, in a conspicuous place on the real estate, it will be presumed that the officer did his duty when he attached the property, and therefore that the service of the order of attachment by him was properly and legally made.—*Wilkins v. Tourtellott*, Kan., 22 Pac. Rep. 11.

7. CONSTITUTIONAL LAW — Bridges.—Const. art. 11, § 5, declares that no county shall be authorized to levy a larger rate of taxation in any one year, on the value of the taxable property therein, than one-half of one per centum, except that they may be authorized to levy special taxes for the erection of necessary bridges: *Held*, that a railroad bridge, to be used by a corporation distinct from the county, does not come within the class of bridges mentioned, and the act is unconstitutional in so far as it authorizes the levy of a special tax for the erection of such bridge.—*Garland v. Board*, Ala., 6 South. Rep. 402.

8. CONSTITUTIONAL LAW — Minors. — A male person over 18 years of age, whose disabilities of minority have been removed by a judgment of a circuit judge, is entitled to be examined as to his qualifications to practice law the same as if he were 21 years of age, upon complying with the other requirements of the statute and rule of court regulating such application. — *State v. Baker*, Fla., 6 South. Rep. 445.

9. CONSTITUTIONAL LAW — Titles of Acts. — Act Nev. February 24, 1866, entitled "An act defining the duties of State comptroller," which contains a provision imposing a penalty upon other officers for delinquencies in making settlements with the comptroller, is, in respect of such provision, repugnant to Const. Nev. art. 4, § 17, providing that every law "shall embrace but one subject, and matter properly connected therewith, which subject shall be briefly expressed in the title."—*State v. Houdley*, Nev., 22 Pac. Rep. 99.

10. CORPORATIONS—Assignment. — The insolvent law of 1881, held applicable to private corporations. The board of directors of a corporation may authorize an assignment by the corporation under that act when the conditions specified in the act exist. — *Tripp v. Northwestern Nat. Bank*, Minn., 43 N. W. Rep. 60.

11. COVENANTS RUNNING WITH THE LAND. — Plaintiff contracted in writing with E, the owner of certain land, to furnish water for a certain period at a certain price, which E agreed to pay for himself and his successors in interest, annually, at stated times. He also covenanted, *inter alia*, [that the contract and covenants therein contained on his part should "run with and bind the land:" *Held*, that under Civil Code Cal. § 2884, which provides that a lien may be created by contract to take immediate effect, as security for the performance of obligations not then in existence, the contract was a lien upon the land of E, and bound it as against any successor of E with notice thereof. — *Fresno Canal Co. v. Rowell*, Cal., 22 Pac. Rep. 53.

12. CRIMINAL LAW—Insanity. — Under §§ 19 and 21, of the Penal Code, an uncontrollable and insane impulse to commit crime, in the mind of one who is conscious of the nature and quality of the act, or that it was wrong, is not allowed as a defense. — *State v. Scott*, Minn., 43 N. W. Rep. 62.

13. CRIMINAL LAW—Murder—Threats. — On trial of an indictment for murder, the statement of a witness that defendant was afraid to go about his premises after dark, on account of threats made against him by the deceased, was incompetent, it being only the opinion of the witness that defendant was afraid; nor would proof of the fears of defendant have been proof of danger, apparent or real. — *Poe v. State*, Ala., 6 South. Rep. 378.

14. CRIMINAL LAW — Rape. — On a trial for rape the court properly refused defendant's request to charge that "while the jury, in considering the evidence of the defendant, may look to the fact that he is a party to the suit, yet being a defendant or party to the suit does not render him any less credible than he would be if he were not a party to the suit." — *Dick v. State*, Ala., 6 South. Rep. 395.

15. CRIMINAL LAW—Rape —On a trial for rape, defend-

ants having introduced evidence to show that the prosecutrix had, before their arrest, given descriptions of her assailants which did not apply to defendants, the State was properly allowed to prove that after defendants' arrest she had unhesitatingly pointed out defendants as her assailants, when they and a number of others were brought before her.—*Cotton v. State*, Ala., 6 South. Rep. 896.

16. CRIMINAL LAW—Assault with Intent to Kill. — Any weapon is a deadly weapon which is likely to produce death, but a weapon capable of producing death is not necessarily a weapon likely to produce death.—*Pittman v. State*, Fla., 6 South. Rep. 457.

17. CRIMINAL LAW—Insanity.—Act Ala. Feb. 27, 1889, § 4, provides that, in prosecutions for murder, the defense of insanity, if set up, shall be interposed by special plea at the time of the defendant's arraignment, and "in substance shall be, 'Not guilty by reason of insanity,'" which plea shall be entered on the docket, but "shall not preclude the usual plea of the general issue, which shall not, however put in issue the question of the responsibility of the accused by reason of his alleged insanity, this question being triable only under the special plea;" and §§ 5, 6, require that the jury shall return a special verdict on the question of defendant's sanity *vel non*: *Held*, that as the record did not show a special plea of insanity, the question was not before the court or jury, and it was not erroneous to refuse all of the requests in relation thereto.—*Perry v. State*, Ala., 6 South. Rep. 427.

18. CRIMINAL LAW—Embezzlement.—On trial of an information for embezzlement, it appeared that defendant was the assignee of an insolvent debtor, and that the assignment named the order in which creditors should be paid. A firm of which defendant was a member was second in the list of creditors, but defendant paid the debt of his own firm first, leaving little for payment of other debts. He also received $737 from sales of milk, and only accounted for $427: *Held*, that the evidence justified the verdict of guilty, as it was for the jury to say whether defendant intended fraudulently to appropriate the property. — *People v. DeLay*, Cal., 22 Pac. Rep. 90.

19. CRIMINAL PRACTICE. — Where a party is on trial charged with murder in the first degree, it is the duty of the court to charge the jury as to the different degrees or grades of homicide applicable to the evidence in the case, but it is not the duty of the court to charge upon a degree of homicide to which the evidence of the case does not apply. — *Hicks v. State*, Fla., 6 South. Rep. 441.

20. CRIMINAL PRACTICE—Appeal. — Under the laws of this State an appeal from a judgment of conviction for the violation of a city ordinance, rendered by a tribunal of the city, does not lie unless expressly given by the city charter or by some statute. — *Barton v. City of La Grande*, Oreg., 22 Pac. Rep. 111.

21. DAMAGES.—Under Civil Code Cal. § 3294, authorizing the recovery of punative damages "in any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed," it is error to charge that if the plaintiff was injured by defendant's act, and "in doing such act defendant was grossly careless," punitive damages might be awarded, as it cannot be said that an act of gross carelessness is always an act done through "oppression, fraud, or malice, actual or presumed."— *Yerian v. Linkletter*, Cal., 22 Pac. Rep. 70.

22. DEED—Boundaries.— Where the descriptions of a deed refer to a survey and a map based thereon, making both a part of the deed, and there is a discrepancy between the map and the survey, the latter will prevail.—*Whiting v. Gardner*, Cal., 22 Pac. Rep. 71.

23. DEED—Wife—Acknowlegment. — Civil Code Cal. §§ 1186, 1191, making a certificate of a married woman's separate examination and acknowledgment of a deed and of the fact that it was explained to her, essential to its validity, does not except married woman living separate from their husbands, and a conveyance by such a women of land constituting her separate estate without such certificate is void, and this result is not affected by § 193, providing that a wife may convey her separate property without her husband's consent. — *Danglade v. Elias*, Cal., 22 Pac. Rep. 69.

24. DEED—Adverse Possession.—A deed which fails to convey the legal title because of its defective acknowledgment affords color of title in the grantee, and the ten years' statute of limitations begins to run from the date of taking possession of the premises under it. — *Hall v. Caperton*, Ala., 6 South. Rep. 888.

25. DIVORCE—Alimony.— Civil Code Cal. § 137, empowering the court, in its discretion, to require the payment of alimony by a husband to a wife, pending an action for a divorce, when necessary to the support of herself or children, or the prosecution or defense of the action, invests the court with nothing but a legal discretion, reviewable on appeal, and an order granting such alimony will be reversed when it appears that the wife occupies the homestead, which yields a good income; that she in an immediate need of money, that the property enjoyed by her is more valuable and productive than that held by the husband; and that he is maintaining the greater number of their children. — *Turner v. Turner*, Cal., 22 Pac. Rep. 72.

26. EMINENT DOMAIN. — Declaration of rights Ala. § 24, providing that the general assembly may authorize the granting of the right of way by one person or corporation over the lands of another, just compensation being made therefor, does not permit the condemnation of land in the actual use of one railroad company for the benefit of another, unless it is reasonably essential to the construction of the second road to its proposed terminus by the only practicable route. But by practicability is meant only that the expense is not disproportionate to the probable benefits. And the taking is essential when, the public convenience being equally served, the financia. interests of the second company will gain more thereby than the first company would probably be injured. — *Mobile, etc. R. Co. v. Alabama, etc. Ry. Co.*, Ala., 6 South. Rep. 404.

27. EMINENT DOMAIN. — Equity will not enjoin a railway company from proceeding to construct its road on the road-bed of another company, pending an appeal without *supersedeas* from a judgment of the probate court condemning a part of the right of way of the last-named company, but not including its tracks, in the absence of some circumstances showing that an irreparable injury will be inflicted, as the probate court has jurisdiction to condemn so much of the right of way as is not in actual use or necessary to the enjoyment of that part so used, and the invasion of the right of way is a simple trespass, for which the legal remedy is ample. — *Mobile, etc. R. Co. v. Alabama, etc. Ry. Co.*, Ala., 6 South. Rep. 407.

28. ENTICING AWAY SERVANT.—One who hires a laborer from an employer, with the consent given by such employer in the presence of a credible witness, on the condition that he pay to the employer a debt due him by the laborer, is not guilty of knowingly enticing away a laborer, under Code Ala. 1886, § 3757, where he complies with the condition. — *Prestwood v. State*, Ala., 6 South. Rep, 892.

29. EQUITY — Intervention. — Where it is not alleged that a fund for distribution, in which petitioner is entitled to share, is depending on the suit, or that a trust relation exists between the petitioner and the parties, the application of a stranger to the record to be allowed to become a defendant by intervention in a suit in equity, against the objection of the litigants, is properly denied.—*In re Printup*, Ala., 6 South. Rep. 418.

30. EVIDENCE—Handwriting. — To show that a signature to a deed was that of one W, deceased, it was proven that he was a justice of the peace, and h

docket was identified, and certain signatures shown to have been those of W: *Held*, that under Code Civil Proc. Cal. § 1944, providing that evidence respecting handwriting may be given by comparison with writings shown to be genuine, an expert could testify that the signatures on the record and the one on the deed were in the same handwriting. — *Marshall v. Hancock*, Cal., 22 Pac. Rep. 61.

31. FRAUDULENT ASSIGNMENT. — Under Gen. St. S. C. § 2014, providing that any assignment for the benefit of creditors, made by an insolvent debtor, containing a preference of one creditor over another, shall be absolutely void, an assignment preferring creditors executed in and by a citizen of Georgia, conveying lands situated in South Carolina, is void, and a proceeding may be instituted in South Carolina to set it aside, though all the parties are non-residents. — *National Exch. Bank v. Stelling*, S. Car., 9 S. E. Rep. 1028.

32. FEDERAL COURTS — Corporations. — Where a corporation, created by the laws of one State, by its officers or agents, comes into a judicial district of another State, and there carries on business, for example, operates lines of railway therein and has there an agent upon whom, under the laws of the latter State, process may be served, it is an inhabitant of said district, within the meaning of the act of congress of March 3, 1887, and is suable in the circuit court of the United States of said district. — *Riddle v. New York, etc. R. Co.*, (U. S. C. C.) Penn., 39 Fed. Rep. 290.

33. GAMING. — The question as to whether the place where a game was played is a public house, within the meaning of Code Ala. 1886, § 4057, forbidding gaming in such a place, is a question of law from the undisputed facts, and is reviewable on appeal in a case tried without a jury.—*Skinner v. State*, Ala., 6 South. Rep. 399.

34. HABEAS CORPUS — Bail. — A person accused of a capital crime, and held under a *mittimus* issued by a magistrate to await the action of the grand jury, is entitled upon *habeas corpus* to introduce evidence and show the real character or circumstances of the alleged offense, and should be admitted to bail unless "the proof is evident, or the presumption great," that he is guilty of a capital offense. This right on *habeas corpus* is not lost or surrendered by the accused having waived a preliminary examination before the magistrate, and the omission of the magistrate to make the examination on account of such waiver.— *Benjamin v. State*, Fla., 6 South. Rep. 433.

35. HOMESTEAD. — A married woman owned a tract of land on which was the family residence. The husband owned adjoining lands and cultivated a portion of them in connection with his wife's land, and put the residue to rent. The lands combined were in excess of the greatest quantity allowed as an exempt homestead: *Held*, under Code Ala. 1876, which did not confine the exemption of the homestead to the head of the family, that, the wife owning, and together with the family occupying, the homestead proper, she was entitled to claim her lands as exempt, and that this disabled the husband, so long as that ownership and occupancy lasted, to assert, as against his debts, a homestead in his lands, on which the family did not reside. — *Beard v. Johnson*, Ala., 6 South. Rep. 883.

36. HOMESTEAD. — An insolvent debtor in securing a homestead for himself and family by moving into and occupying as his dwelling a building which he owns, for the express purpose of holding it as exempt, takes nothing from his creditors in which they have any vested right, and hence commits no legal fraud. In thus putting his property into a shape in which it will be the subject of a beneficial provision for himself and family, he merely exercises a right which the law gives him. — *Jacoby v. Parkland Distilling Co.*, Minn., 43 N. W. Rep. 52.

37. HOMESTEAD — Abandonment. — Plaintiff was the owner of land in a city, which he claimed as a homestead. He moved from his old house in the middle of the land to a house which he built on the west end of it, and rented the old house as a boarding-house. He afterwards built a third house on the east end of the lot, which he rented for the purposes of income. The property had never been subdivided by survey, but fences had been built between the houses. Plaintiff reserved no rights in the rented property, but used a cistern on the line of the fence between the middle and the eastern houses, crossing the middle lot for that purpose: *Held*, that plaintiff still had a homestead in the middle lot, but the east lot, having been abandoned as a homestead, was no longer exempt from execution.—*Langston v. Maxey*, Tex., 12 S. W. Rep. 27.

38. HOMESTEADS.—Code Civil Proc. Cal. § 1465, authorizing a court to set apart for the benefit of the surviving wife or husband the homestead already selected, if any, or, if none, to designate a homestead for the use of the "surviving husband or wife and the minor children," when construed with § 1468, which provides that a homestead set apart shall be the property of the surviving wife or husband where there is no minor child, entitles a widow to such homestead, though her husband died childless. — *In re Armstrong's Estate*, Cal., 22 Pac. Rep. 79.

39. INJUNCTION — Estoppel. — In a suit to enjoin the execution of a writ of restitution issued on a judgment of forcible detainer, on the ground that such judgment did not embrace forty-nine acres which it was proposed to put the judgment plaintiffs into possession of under the writ, the description in that judgment was not controlling, but defendants were entitled to show that by former conveyances and transactions between the parties and their privies such a construction should equitably be put upon the description in the judgment, which followed the description in the deeds, as would embrace the forty-nine acres in dispute, and that plaintiff was by his acts precluded from denying the correctness of such a construction. — *Pardue v. James*, Tex., 12 S. W. Rep. 1.

40. INJUNCTION—Trespass. — The court will not enjoin a municipal corporation from laying a ditch or flume over private property, though the entry by the city was made on the Sabbath day, and in a forcible and lawless manner, where it appears that the ditch is for a necessary public purpose, and that complainant's damages are but trifling. — *McCullough v. City of Denver*, (U. S. C. C.) Colo., 39 Fed. Rep. 308.

41. INSURANCE — Conditions. — A policy of insurance provided that either party might require an arbitration "touching any loss or damage," and that the award "shall be binding as to the amount of such loss or damage, but shall not decide the liability of the company under this policy:" *Held*, that an arbitration and award, merely as to the amount of the loss, at the instance of the insurer, did not forbid the subsequent denial of legal liability upon the ground that the policy was void for reasons known to the assured when the arbitration was instituted. — *Johnson v. American Fire Ins. Co.*, Minn., 43 N. W. Rep. 59.

42. INTOXICATING LIQUORS.— On trial of an indictment charging defendant with selling without license liquor which was drunk on or about his premises, in violation of Code Ala. 1886, § 4036, it is no defense that defendant was licensed as a wholesale dealer, and that the liquor, though drunk within five or six steps of his store, was drunk in the public road, over which defendant had no control; nor will it avail as a defense that he did not notice the act of drinking at the time. — *Whaley v. State*, Ala., 6 South. Rep. 380.

43. JUDGMENT— Contribution. — Where one of several joint wrong doers pays the judgment obtained against them all, he acquires no right of contribution by taking an assignment of the judgment in the name of another, who is merely a man of straw.—*Boyer v. Bolender*, Penn., 18 Atl. Rep. 127.

44. JUDGMENTS — Revival.— A number of judgments against the same person may be consolidated and re-

vived in one amicable action of *scire facias*, although one of them is also against another defendant, and, when so revived, the continuity of the liens is preserved.—*Appeal of Yeager*, Penn., 18 Atl. Rep. 137.

45. LIBEL.— The law in libel, as held by this court, being that to publish of and concerning a person any language which tends to bring him into ill repute, or to destroy the confidence of his neighbors in his integrity, is libelous, and actionable *per se*, printed and published words which clearly imply that a person is a hypocrite, and under the cloak of hypocrisy oppresses widows and orphans, is so actionable. — *Jones v. Greeley*, Fla., 6 South. Rep. 448.

46. LIMITATION OF ACTIONS.—A railroad company gave to the State a mortgage of "all the right, title, interest, and estate which said company now has, or may hereafter lawfully acquire, in and to" its land grant, the legal title to which was then in the State, which by the terms of the grant was to retain it until the completion of the road. The mortgage contained the words, "grant, bargain, sell, and convey," which by statute constitute covenants of seizin in fee and for quiet enjoyment: *Held*, that on the completion of the road the legal title still remained in the State by virtue of the mortgage, and the ten-years' statute of limitations did not begin to run in favor of an adverse occupant until the subsequent conveyance of the legal title by the State to plaintiffs. — *Swan v. Gaston*, Ala., 6 South. Rep. 386.

47. LIS PENDENS. — The doctrine of *lis pendens* applies in Texas, where citation has been published for the time required by law, and the officer has made his return, and the petition affecting land is filed, though defendant has till the next term of court to answer. — *Cassidy v. Kluge*, Tex., 12 S. W. Rep. 12.

48. MASTER AND SERVANT — Fellow servants. —A car inspecter is not a fellow-servant with a brakeman, but is a representative of the employer. While a brakeman cannot recover for injuries caused by defective brakes if he had, or by the exercise of reasonable prudence might have had, knowlege of such defects, he is not bound to look for latent or hidden defects. — *Carpenter v. Mexican, etc. R. Co.*, (U. S. C. C.) Tex., 39 Fed. Rep. 315.

49. MARRIAGE. — A marriage between a man and a woman related within the degrees prohibited by law is not void but voidable, and, until dissolved by a court of competent jurisdiction, must, in all collateral proceedings, be treated as valid. — *Boylan v. Deinzer*, N. J., 18 Atl. Rep. 119.

50. MENTAL INCAPACITY. — In an action in which the oratrix seeks to avoid a release on the ground of mental incapacity at the time it was executed, the testimony of non-expert witnesses is admissible to prove mental incapacity, where the witnesses give their opportunities for observation, and detail conversations had with the oratrix, and state their opinions based thereon, though the master who hears the testimony is of opinion that the conversations, as detailed, do not show mental incapacity. — *Chickering v. Brooks*, Vt., 18 Atl. Rep. 144.

51. MORTGAGE—Set-off. — In an action to foreclose a mortgage securing promissory notes, the mortgagor cannot set-off demands against an intermediate holder of the notes and mortgage, unless founded on an agreement supported by a new consideration, in pursuance of which the intermediate holder procured the notes, or which was entered into by the parties while the notes were in his hands. — *Brown v. Scott*. Ala., 6 South. Rep. 384.

52. MUNICIPAL CORPORATIONS — Street Contracts.—An agreement extending the time for completion of a street contract, made after the expiration of the time originally agreed upon, is void against the city, as well as against property owners, under Act. Cal. April 1, 1872, which makes time of the essence of such contracts. It is immaterial that such extension was made with knowledge on the part of the city that the work had not been finished, and that upon the faith of such extension the contractor expended money in good faith. —*Raisch v. City of San Francisco*, Cal., 22 Pac. Rep. 22.

53. NATIONAL BANKS— Stockholders.— Where a shareholder of a national bank makes a *bona fide* sale of his stock, and goes with the purchaser to the bank, indorses the certificate, and delivers it to the cashier of the bank, with directions to make the transfer on the books, he has done all that is incumbent upon him to discharge his liability, and he is not liable, though the cashier failed to make the transfer, upon the subsequent suspension of the bank, for an assessment made by the comptroller of the currency, under Rev. St. U. S. § 5151, to pay the banks debts.— *Hayes v. Shoemaker*, (U. S. C. C.) N. Y., 39 Fed. Rep. 319.

54. NEGOTIABLE INSTRUMENT— Consideration.—Where defendant signed a note some months after its date and delivery by the original maker, and there was no extension of payment, nor promise of forbearance, she was not bound thereby. — *Leverone v. Hildreth*, Cal., 22 Pac. Rep. 72.

55. NEGOTIABLE INSTRUMENTS. — Promissory notes, and a mortgage securing the same, cannot be enforced on the basis of a different consideration from the one for which they were given.—*Lewter v. Price*, Fla., 6 South. Rep. 439.

56. PARTNERSHIP.— The rule that land belonging to a partnership is, under some circumstances, treated in equity as personal property, applies only to administration and adjustment of partnership affairs, and in no way abrogates the law requiring transfers of land to be in writing. — *Carothers v. Alexander*, Tex., 12 S. W. Rep. 4.

57. PARTNERSHIP. — Where an action is by a partnership against a single defendant, and his property is attached in the action, another attachment creditor cannot set up, to defeat the prior attachment, the extrinsic facts that one of the plaintiffs is a partner with defendant and that the debt sued for is a partnership. —*Alexander v. King*, Ala., 6 South. Rep. 382.

58. PEDDLERS.— A salesman, who goes from house to house carrying with him a sample stove, and who takes orders for stoves that are filled by the delivery of stoves other than the one carried as a sample, is not a peddler, within the meaning of Code Ala. § 629, subd. 31, requiring peddlers to take out a license; as the distinctive feature of a peddler consists in his going from house to house or from place to place, carrying his articles, and concurrently selling and delivering them.—*Ballou v. State*, Ala., 6 South. Rep. 393.

59. PLEADING—Contract. —After a full trial of a cause, and after verdict upon the matters embraced in the declaration and pleas, the absence of a *similiter* to a plea is not ground for reversal, the *similiter* not having been insisted upon by the opposing party or required by the court.—*Wilson v. Hunter*, Fla., 6 South. Rep. 432.

60. POLYGAMY. — Orders, organizations, associations, or by whatever name called, which teach, advise, counsel, encourage, or practice the commission of crimes forbidden by law, are criminal organizations. To become and continue to be members of such organizations are such overt acts of recognition and participation as make them *particeps criminis*, and as guilty, in contemplation of law, as though they actively engaged in promoting their unlawful objects and purposes. — *Wooley v. Watkins*, Idaho, 22 Pac. Rep. 102.

61. PRACTICE—Stipulation.—A stipulation between the parties to an action of trespass to try title, that the "only issue is one of boundary and identification of plaintiff's and defendant's real estate," eliminates the question of the statute of limitations from the case. — *Cushing v. Smith*, Tex., 12 S. W. Rep. 19.

62. PRACTICE — Instructions. — In case a requested special charge is considered irresponsive to the proven facts and inapplicable to the case, it is proper that the

trial judge should decline to give it to the jury.—*State v. Beck*, La., 6 South. Rep. 451.

63. PRINCIPAL AND AGENT. — Plaintiff agreed to purchase of defendants, real estate agents, certain land, which they informed him they were selling for the owners. He paid defendants $300 of the purchase price, and they remitted the same to the owners. Subsequently plaintiff notified one of the owners that he would not complete the purchase because of delay in executing the deed. The owner said he did not care whether the sale was made or not, and thereupon paid the $300 back to defendants, telling plaintiff to settle with them. Defendants refused to return the money to plaintiff, claiming that he had forfeited it. It an action to recover it: *Held*, that if any one was liable to plaintiff it was the owners, and not defendants. — *Bogart v. Crosby*, Cal., 22 Pac. Rep. 82.

64. PUBLIC LANDS.—A party seeking to attack a patent must show that he is connected in some way with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent. — *Cucamonga Fruit & Land Co. v. Meir*, Cal., 22 Pac. Rep. 55.

65. QUIETING TITLE. — Where land is conveyed by a deed absolute in form, to secure an indebtedness, the owner of the equitable title cannot have the same quieted without a payment of the debt, though it be barred by the statute of limitations. — *Rodriguez De Cazara v. Orena*, Cal., 22 Pac. Rep. 74.

66. REPLEVIN— Practice. — The statutory remedy by which a claimant of property seized under judicial process as the property of another may try his right thereto is not exclusive, and he may instead bring a suit at law for that purpose. — *Lang v. Daugherty*, Tex., 12 S. W. Rep. 29.

67. RES JUDICATA.— Where, in a suit between plaintiff and defendant's grantor, it has been determined that a judgment, under which the latter has purchased the land in question, was valid, the question is *res judicata* in a suit between plaintiff and defendants. — *Preston v. Weissbein*, Cal., 22 Pac. Rep. 56.

68. SALE — Evidence. — Where a verbal order for goods is given to a traveling salesman, and a memorandum thereof is made by him, and a copy of such memorandum forwarded to his principal, the error, if any, in admitting the copy in an action for the price to prove the sale, is cured where the salesman, after refreshing his memory by his memorandum made at the time, testifies that he then sold the goods mentioned to defendant.—*Hodges v. Tarrant*, S. Car., 9 S. E. Rep. 1038.

69. TAXATION. — A complaint in an action to recover taxes paid under protest, which alleges that the assessment did not show "the number, kind, amount, and quality" of the personal property assessed, is demurrable; it being sufficient if the assessment shows generally the character of the property, under Pol. Code Cal. § 3650, providing that a failure to enumerate personal property in detail shall not invalidate the assessment.—*Dear v. Varnum*, Cal., 22 Pac. Rep. 76.

70. TAXATION— National Banks. — Rev. St. U. S. § 5219, providing that shares of national bank stock may be taxed as part of the personalty of the owner, and that each State may tax them in its own manner, except that the taxation shall not be at a greater rate than is imposed on other "moneyed capital" owned by citizens of the State, and that the shares of non-residents shall only be taxed in the city wherein the bank is located, do not authorize the taxation of the stock of a bank *in solido* by the city in which it does business, but only the shares of individual owners residing in the city are taxable, and they must be taxed separately, in order that the owner may deduct from their value the amount of his personal indebtedness, where the State laws or municipal ordinances permit such deductions, and require equality of taxation. — *First Nat. Bank of Richmond v. City of Richmond*, (U. S. C. C.) Va., 39 Fed. Rep. 309.

71. TRUSTS—Declaration.— A had made at B's request a declaration of trust of certain shares of stock in favor of C, stating in the declaration that it was in accordance with an "arrangement between A, B and C." This arrangement was shown to relate to another matter. Afterwards when pressed by C, A, while not repudiateing the trust, asserted C's interest to be a qualified one, subject to B's debt. The evidence showed that, while A may have considered his declaration a qualified one, it was not so treated by B or C, and that C refused to acquiesce in the statement that it was so: *Held*, that an absolute trust was established. — *Snyder's Adm'rs v. McComb's Ex'x.*, (U. S. C. C.) Del., 39 Fed. Rep. 292.

72. VENDOR AND VENDEE. — Where a contract for the sale of land was made by one acting as agent, in the immediate presence of the owners, and the sum paid on the purchase price was, by the direction of one of the owners, immediately paid by the agent to the other, and the owners subsequently directed the agent to execute a written contract for the land, the sale was in legal effect made by the owners, and the fact that the agent did not have written authority to make the sale was unimportant. — *Karns v. Olney*, Cal., 22 Pac. Rep. 57.

73. VERDICT. — Where answers to special interrogatories are not signed by the jury as a whole, nor by their foreman, as provided by Code Civil Proc. Cal. § 618, they are not effective for any purpose. — *Greenberg v. Hof*, Cal., 22 Rac. Rep. 69.

74. WATERS AND WATER-COURSES. — A riparian owner may grant a part of his estate, not abutting on the stream, and as appurtenant thereto a right to draw water from the stream through his remaining land; and for any diversion of the natural flow of the stream disturbing such right the grantee may maintain an action.—*St. Anthony Falls, etc. Co. v. City of Minneapolis*, Minn., 43 N. W. Rep. 56.

75. WATERS AND WATERS COURSES. — While an upper riparian owner cannot divert water for sale or use on non-riparian lands, or unreasonably use or divert the water to the injury of owners further down the stream, it is error, upon enjoining him from such unauthorized diversion, to require him to permit no water to flow into a canal constructed by him for the purpose of irrigating non-riparian land, but which, though not so intended, can be used to irrigate his riparian land, and compel him to close up his canal, as he may hereafter desire to use it legitimately, either to water riparian land, or to carry off surplus water in time of flood, when no one below him would be injured thereby. — *Heilbron v. Land Water Co.*, Cal., 22 Pac. Rep. 62.

76. WATERS AND WATER-COURSES. — In an action by a lower against upper appropriators to determine who has the superior right to divert the water of the stream, a finding that plaintiff has adversely appropriated the waters of the stream, "the waters so diverted and used being sufficient to fill its ditch, whenever there was water in the stream to fill it, and when there was not sufficient water to fill plaintiff's said ditch it took what water came down the creek in its natural flow," is indefinite and uncertain. If plaintiff diverted only the water that defendants allowed to pass plaintiff acquired no right as against defendants to a supply of water sufficient to fill its ditch. — *Lakeside Ditch Co. v. Crane*, Cal., 22 Pac. Rep. 77.

77. WILLS—Accumulations.— A bequest of property in trust to divide and pay the income to testator's nephews and nieces during their respective lives, and after their deaths in trust for their children who shall attain the age of 21 years or marry, vests the *corpus* of the fund in the children of the legatees, upon the attainment of their majority or their marriage. — *Goldtree v. Thompson*, Cal., 22 Pac. Rep. 50.

78. WILLS—Construction.—A will disposing of "all the estate I now owe and possess" applies to realty acquired after its execution. — *Haley v. Gatewood*, Tex., 12 S. W. Rep. 25.